

**CONSTITUTIONAL AMENDMENT TO RESTORE
LEGISLATIVE VETO**

HEARING
BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

S.J. Res. 135

A JOINT RESOLUTION PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES FOR THE ESTABLISHMENT OF A LEGISLATIVE VETO

MARCH 2, 1984

Serial No. J-98-95

Printed for the use of the Committee on the Judiciary



U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1985

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CONSTITUTIONAL AMENDMENT TO RESTORE LEGISLATIVE VETO

FRIDAY, MARCH 2, 1984

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met at 9:35 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Dennis DeConcini (acting chairman) presiding.

Also present: Senators Hatch and Grassley.

Staff present: Reddick A. Bowman, Jr. (full committee); Stephen J. Markman, chief counsel and staff director; Dee V. Benson, special counsel; Carol E. Epps, chief clerk; Diane Franke, clerk; Robert E. Feidler, chief minority counsel; Phillip Malone and Yvonne Hunter, staff assistants (Subcommittee on the Constitution); and Alice R. Milder, general counsel (Subcommittee on Administrative Practice and Procedure).

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. I am happy to call this Senate Judiciary Subcommittee on the Constitution meeting to order, and it is a pleasure to have all of the witnesses that we have here today.

We are here today to consider Senate Joint Resolution 135, which proposes an amendment to the U.S. Constitution establishing a legislative veto. For the past 50 years, a legislative veto in one form or another has been included in bills and resolutions of the Congress as a means of vetoing, if necessary, certain rules and regulations of the executive branch and agencies.

This veto tool was viewed as desirable because it permitted the granting of broad legislative authority to the executive agencies with the important protection of prospective congressional review.

Such a process took advantage of the specialized expertise of the various agencies and, at the same time, prevented the abuse by the agencies of the broad legislative authority they had been given.

Viewed in a legislatively positive way, the legislative veto operated to assure the multitude of agency rules and regulations, which outnumber legislative statutes 18 to 1, are in harmony with the legislative enactments from which they spring.

Regardless of the value of the legislative veto and the efficiency it gives to our system of government, the legislative veto suffered a fatal blow in 1983 when the U.S. Supreme Court decided *Immigration and Naturalization Service v. Chadha*. In that case the Court struck down a subsection of the Immigration and Nationality Act, which authorized either House of Congress by resolution to invalidate the decision of the U.S. Attorney General with respect to whether a particular deportable alien may remain in the United States.

The Court found the subsection to be unconstitutional because, as the majority saw it, the subsection permitted the legislative branch to insert itself into the activities of the executive branch.

The *Chadha* decision has been generally considered to invalidate almost all legislative vetoes. As a result, Congress is presently attempting, through the proposed constitutional amendment we are here to consider, to permit the concept of the legislative veto to once again be available as a useful tool in our work here in Congress.

[The proposed amendment to the Constitution, S.J. Res. 135, follows:]

98TH CONGRESS
1ST SESSION

S. J. RES. 135

Proposing an amendment to the Constitution of the United States for the establishment of a legislative veto.

IN THE SENATE OF THE UNITED STATES

JULY 27 (legislative day, JULY 25), 1983

Mr. DECONCINI introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States for the establishment of a legislative veto.

- 1 *Resolved by the Senate and House of Representatives of*
- 2 *the United States of America in Congress assembled, (two-*
- 3 *thirds of each House concurring therein), That the following*
- 4 *article is proposed as an amendment to the Constitution of*
- 5 *the United States, which shall be valid to all intents and*
- 6 *purposes as part of the Constitution when ratified by the leg-*
- 7 *islatures of three-fourths of the several States within seven*
- 8 *years after the date of its submission by the Congress:*

1 "ARTICLE —

2 "SECTION 1. Executive action under legislatively dele-
3 gated authority may be subject to the approval of one or both
4 Houses of Congress, without presentment to the President, if
5 the legislation that authorizes the executive action so
6 provides."

○

Senator HATCH. This hearing has been arranged and organized under the very able work and direction of Senator Dennis DeConcini, who is the ranking member of this subcommittee. We have been alternating. One year he is chairman, and the next year I am chairman, but I just want to say that——

Senator DeCONCINI. It is my turn.

Senator HATCH. It is Senator DeConcini's turn next year, but Senator DeConcini has really been an active, aggressive and very good leader on this subcommittee and in the Judiciary Committee as a whole.

Before I turn the time over to Senator DeConcini, I would like to recognize Senator Charles Grassley, who is also a member of this subcommittee. He is here today both as a member and a very capable witness. Senator Grassley has been a leader at the forefront of the congressional movement to establish an effective form of legislative veto. He is currently the sponsor of an amendment to S. 1080, which is designed to statutorially provide effective legislative review of agency rulemaking.

I have added my name as a cosponsor of that amendment. Senator Grassley is also chairman of the Judiciary Committee's Subcommittee on Administrative Practice and Procedure, which has and may continue to hold important hearings on Senator Grassley's proposed amendment.

We recognize Senator Grassley's broad experience and the depth of his knowledge in this important area of regulatory control.

My good friend, Senator DeConcini, is also a knowledgeable leader on this issue, and I thank him for his efforts in arranging this hearing. So I will turn the time over to Senator DeConcini for the introduction of our distinguished witnesses, and I will also ask him to, in my absence, of course, chair this meeting. Because of the ongoing hearing of the full Judiciary Committee on the President's nomination of Edwin Meese III, as Attorney General of the United States, I will be forced to miss part of these hearings and most of the remainder of them. So we will turn the time over to my colleague, Senator DeConcini.

OPENING STATEMENT OF SENATOR DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DeCONCINI. Mr. Chairman, thank you very much for the cooperation that you have always given us and for having these hearings today. I am most appreciative of your willingness to share the chairmanship of this committee, and I am pleased to handle the committee hearings today. I would be happy to yield to the Senator from Iowa shortly for a statement before we have testimony from our witnesses.

I would like to welcome the witnesses today to the hearing. We are very fortunate to have on hand these panelists, each of them distinguished members of the legal community who have a great deal of experience in the area of legislative veto and the problems presented by the *Chadha* decision.

As you know, I am a strong supporter of Congress' power to maintain the responsibility and accountability of agencies acting under power delegated by the Congress. I believe that Congress, as a lawmaking body elected and directly accountable to the people,

should retain ultimate responsibility for the exercise of lawmaking power.

In an attempt to restore this necessary power to Congress in the aftermath of *Chadha*, I have joined with my colleagues in cosponsoring various pieces of legislation to restore the constitutional legislative veto machinery. I believe, however, that the most effective and comprehensive solution to this issue is the constitutional amendment we have before us today.

The intent of the amendment is to restore the status quo that existed before *Chadha*. The amendment would, of course, exclude from its broad sweep action of the President under authority granted to him directly by the Constitution, such as authority of the Commander in Chief, pardoning power, and authority for foreign relations.

The distinction is intended between those actions, which might on a functional analysis be characterized as executive, and those which might be considered quasi-legislative.

Mr. Chairman, as a further explanation of the intent and operation of my amendment, I would like to have an article, coauthored by myself and Robert Faucher and published in the latest issue of the *Harvard Journal on Legislation*, included at this point in the record.

Senator HATCH. Without objection, so ordered.

[The material referred to follows:]

ARTICLE

THE LEGISLATIVE VETO: A CONSTITUTIONAL AMENDMENT

DENNIS DECONCINI*
ROBERT FAUCHER**

In response to the Supreme Court's decision in INS v. Chadha, Senator DeConcini introduced a joint resolution that would amend the Constitution to provide expressly for a legislative veto mechanism. The Subcommittee on the Constitution of the Senate Judiciary Committee has scheduled hearings on Senator DeConcini's bill for February, 1984.

In this Article, Senator DeConcini and Mr. Faucher sketch the history of the legislative veto, from the "laying procedure" of colonial times to the Chadha decision. The authors then discuss the proposed amendment and demonstrate how the amendment reinforces the separation of powers and preserves Congress's constitutional role in the lawmaking process. Senator DeConcini and Mr. Faucher argue that the legislative veto mechanism promotes efficiency in government and increases Congress's ability to check abuses of power by the executive branch. They contend that the Chadha decision, with its literal reading of the Article I requirements, has not altered or diluted the separation of powers rationale that has persuaded Congresses, for over fifty years, to adopt and utilize the legislative veto. Finally, the authors review alternatives to the legislative veto and conclude that the amendment is necessary to restore a balance of power among the branches of government.

In *INS v. Chadha*,¹ the Supreme Court held unconstitutional the one-House veto provision contained in section 244(c)(2) of the Immigration and Nationality Act.² The Supreme Court's sweeping language in *Chadha* appears to invalidate every use of the legislative veto,³ and this decision "will be remembered as the beginning of a fundamental restructuring of the powers between the executive and legislative branches in Washington."⁴

* Member, United States Senate (D-Ariz.). B.A., University of Arizona, 1959; LL.B., University of Arizona Law School, 1963. Senator DeConcini is the ranking minority member of the Subcommittee on the Constitution of the Senate Judiciary Committee and was the former Chairman of the Subcommittee on Courts.

** B.A., Arizona State University, 1980; J.D., College of Law, Arizona State University, 1983.

¹ 103 S. Ct. 2764 (1983).

² Act of Oct. 24, 1962, Pub.L.No. 87-885, § 4, 76 Stat. 1247, 1248, amending Immigration and Nationality Act, ch. 477, § 244(c), 66 Stat. 163, 216 (1952) (codified at 8 U.S.C. § 1254(c)(2) (1982)).

³ *Chadha*, 103 S. Ct. at 2788 (Powell, J., concurring); *id.* at 2792 (White, J., dissenting). "Today's decision strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history." *Id.* at 2810-11 (White, J., dissenting).

⁴ 129 CONG. REC. S9554 (daily ed. June 29, 1983) (statement of Sen. Nunn (D-Ga.)).

A constitutional amendment proposed in response to *Chadha*, S.J. Res. 135,⁵ would prevent this "fundamental restructuring of powers" by expressly providing for a legislative veto mechanism in the Constitution. Moreover, both by promoting efficient government and by increasing Congress's ability to check abuses of power by administrative agencies, such an amendment would reinforce the separation of powers doctrine incorporated in the Constitution.

The legislative veto has been surrounded by controversy⁶ since its first modern use in 1932.⁷ This controversy involves the respective powers, limitations, and responsibilities of the executive, legislative, and judicial branches of government under the Constitution. Before *Chadha*, "[t]he legislative veto offered the means by which Congress could confer additional authority while preserving its own constitutional role."⁸ The proposed amendment would reinstate the means by which Congress can delegate broad authority to the executive branch, yet retain its constitutional mandate to check the exercise of that power.

This Article first will sketch a brief history of the congressional veto, from the "laying procedure" of colonial times to the termination of its use with the decision in *Chadha*. The main body of this article will deal with S.J. Res. 135, which would restore Congress's right to approval of executive actions through the legislative veto device. After explaining the amendment, the Article will demonstrate how the amendment complements the constitutional framework and accords with the political theory underlying the Constitution. Finally, the Article reviews other approaches with which Congress can respond to the Supreme Court's holding in *Chadha* and concludes that this constitutional amendment is necessary to restore a balance of power among the branches of government.

I. HISTORICAL DEVELOPMENT OF THE CONGRESSIONAL VETO

The modern congressional veto device evolved from an early British parliamentary antecedent, the laying system. As early

⁵ S.J. Res. 135, 98th Cong., 1st Sess., 129 CONG. REC. S11,015-17 (daily ed. July 27, 1983).

⁶ For a survey of materials on the controversy see *Chadha*, 103 S. Ct. at 2797 nn.12-14 (White, J., dissenting).

⁷ Act of June 30, 1932, ch. 314, § 407, 47 Stat. 382, 414 (authorizing reorganization of executive departments subject to legislative review).

⁸ *Chadha*, 103 S. Ct. at 2793 (White, J., dissenting).

as 1386, Parliament delegated authority to make rules and regulations to various executive agents.⁹ Such delegation of statutory authority increased over the centuries¹⁰ and included the delegation by Parliament of legislative and judicial authority in the American colonies.¹¹ By the eighteenth century, it was not uncommon for delegation statutes to contain provisions that required delegates to lay before Parliament various matters under their charge, including rules and regulations.¹²

The delegation of legislative authority, along with other principles of British parliamentary government, formed the background for the writing of the Constitution and provided guidance for early congressional statutes requiring delegates to "lay before" Congress several matters which were under their delegated control.¹³ A notable example of the laying of delegated legislation involved the administration of the Louisiana Purchase. In 1804, Congress passed an act that divided the recently purchased land of Louisiana into two territories and delegated Congress's rulemaking authority under the Constitution¹⁴ to the governors of the two territories, subject to disapproval of such rules by Congress:

The legislative powers shall be vested in the governor, and in thirteen of the most fit and discreet persons of the territory The governor shall publish throughout the said terri-

⁹ 10 Rich. 2, ch. 1 (1386).

¹⁰ See, e.g., Statute of Wales, 34 & 35 Hen. 8, ch. 26, §§ 119-120 (1542-1543) (authorizing Henry VIII to issue rules for governing Wales, including the power to levy taxes); 9 Geo. 3, ch. 8 (1769) (empowering certain harbor commissioners "to make such Bye-laws, Rules, Orders, and Regulations, as shall be found necessary for the Purposes in this Act . . .").

¹¹ See, e.g., 14 Geo. 3, ch. 19 (1774) (giving the King authority to reopen all or part of port of Boston); 14 Geo. 3, ch. 83 (1774) (authorizing the King to appoint council for governing Quebec with power to make ordinances, to avoid "delay and inconvenience").

¹² See, e.g., 18 Geo. 3, ch. 13 (1778) (granting commissioners the power to make "Regulation, Provision, Matters" to quiet disorder, but providing that the regulations should not become effective until confirmed by Parliament); see also 9 Anne, ch. 21, § 17 (1710); 1 Geo., stat. 2, ch. 21, § 8 (1714); 27 Geo. 3, ch. 13, § 122 (1787); 33 Geo. 3, ch. 29, § 9 (1793) (all requiring the delegates to lay before Parliament matters relating to finances); 31 Geo. 3, ch. 30 (1791) (requiring the King to lay before Parliament orders he was authorized to make with respect to the price of grain).

¹³ See, e.g., Act of May 4, 1798, ch. 38, § 2, 1 Stat. 555, 555-56; Act of May 6, 1796, ch. 21, § 4, 1 Stat. 461, 461; Act of Mar. 3, 1795, ch. 43, § 13, 1 Stat. 426, 429; Act of July 1, 1790, ch. 22, 1 Stat. 128. See generally *Chadha*, 103 S. Ct. at 2800 n.18 (White, J., dissenting); *Sibbach v. Wilson*, 312 U.S. 1, 15 n.17 (1941); *A Motion for Leave to file Amici Curiae Brief, and the Brief Amici Curiae of The Honorable Charles Pashayan, Jr., Process Gas Consumers Group v. Consumer Energy Council of America*, 103 S. Ct. 3556 (1983) (brief for consolidated case, United States House of Representatives v. FTC).

¹⁴ "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property, belonging to the United States . . ." U.S. CONST. art. IV, § 3, cl. 2.

tory, all the laws which shall be made, and shall from time to time, report the same to the President of the United States, *to be laid before Congress; which, if disapproved of by Congress, shall thenceforth be of no force.*¹⁵

Although the statutory requirements vary, typically under the laying procedure Congress delegates authority to an agent to perform some legislative act, subject to the condition that the act will not assume the force of law until after a certain period of time during which the agent presents his proposed action to Congress. During the post-presentment period, Congress may disapprove of the proposal by passing a law (to be presented to the President), which would nullify or amend the proposed action. Without congressional action, the proposal becomes law.¹⁶

The modern legislative veto evolved from this laying procedure. The congressional veto, however, differs from the laying procedure in that Congress expresses its disapproval of a delegatee's proposal without the formal passage of a second piece of legislation. Historically, congressional veto provisions have lacked uniformity. Statutes may require that executive proposals be approved by Congress before they can be implemented, or they may provide that any such proposals would become effective unless specifically disapproved by Congress within a designated period.¹⁷ Some statutes authorize either the Senate or the House of Representatives, acting alone, to reject proposals.¹⁸ Other statutes require that both Houses grant approval or

¹⁵ Act of Mar. 26, 1804, ch. 38, § 4, 2 Stat. 283, 284 (emphasis added).

¹⁶ See, e.g., Act of June 19, 1934, ch. 651, 48 Stat. 1064 (current version at 28 U.S.C. § 2072 (1976)) (Federal Rules of Civil Procedure prescribed by the Supreme Court shall not take effect until the expiration of ninety days after they have been reported to Congress). In *Sibbach v. Wilson*, 312 U.S. 1, 15-16 (1941) (footnote omitted), the Court noted that:

in accordance with the Act, the rules were submitted to the Congress so that that body might examine them and veto their going into effect if contrary to the policy of the legislature.

The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose.

¹⁷ See, e.g., Trade Expansion Act of 1962, Pub. L. No. 87-794, § 351, 76 Stat. 872, 899 (codified at 19 U.S.C. § 1981(a) (1982)) (tariff or duty recommended by the International Trade Commission may be imposed by concurrent resolution of approval); International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 211(a), 90 Stat. 729, 743 (codified as amended at 22 U.S.C. 2776(b)(1) (Supp. V 1981)) (President's letter of offer to sell major defense equipment may be disapproved by concurrent resolution); Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. No. 93-577, § 12, 88 Stat. 1878, 1892-93 (codified at 42 U.S.C. § 5911 (1976)) (rules or orders proposed by the President concerning allocation or acquisition of essential materials may be disapproved by a resolution of either House).

¹⁸ See, e.g., Naval Petroleum Reserves Production Act of 1976, Pub. L. No. 94-258, § 201(f), 90 Stat. 303, 309 (codified at 10 U.S.C. § 7422(c)(2)(C) (1982)) (President's

pass a disapproval measure.¹⁹ A number of statutes, however, allow affirmation or rejection merely by committee action.²⁰

The types of measures that may be used by Congress to express its approval or disapproval also differ. Quite often, a simple resolution of either House is sufficient.²¹ Many laws provide that a concurrent resolution of approval or disapproval must be employed.²² A few congressional veto acts in recent years have required that both Houses pass a joint resolution.²³

Typically, a legislative veto provision is included in a statute as part of a compromise between the executive and legislative branches whereby the executive is delegated authority, the exercise of which is subject to a form of congressional approval.²⁴

extension of production period for naval petroleum reserves may be disapproved by resolution of either House); Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 43(f)(3), 92 Stat. 1705, 1752 (codified at 49 U.S.C. § 1552(f)(3) (Supp. V 1981)) (rules or regulations governing employee protection program may be disapproved by a resolution of either House).

¹⁹ See, e.g., International Navigational Rules Act of 1977, Pub. L. No. 95-75, § 3(d), 91 Stat. 308, 308-09 (codified at 33 U.S.C. § 1602(d) (Supp. V 1981)) (presidential proclamation of International Regulations for Preventing Collisions at Sea may be disapproved by concurrent resolution); Federal Civil Defense Act of 1950, Pub. L. No. 81-920, § 201(g), 64 Stat. 1245, 1248 (codified at 50 U.S.C. app. § 2281(g) (Supp. V 1981)) (interstate civil defense compacts may be disapproved by concurrent resolution).

²⁰ See, e.g., Futures Trading Act of 1978, Pub. L. No. 95-405, § 26, 92 Stat. 865, 877 (codified at 7 U.S.C. § 16(a) (1982)) (two-committee approval of any plan of fees developed by the Commodity Futures Trading Commission to cover the estimated cost of regulating transactions); Act of Sept. 5, 1962, Pub. L. No. 87-639, § 1, 76 Stat. 438 (codified at 16 U.S.C. § 1009 (1982)) (one committee of either House may direct the making of investigations, surveys, and reports for flood prevention).

²¹ See, e.g., Federal Pay Comparability Act of 1970, Pub. L. No. 91-656, § 3(a), 84 Stat. 1946, 1949 (codified at 5 U.S.C. § 5305(m) (1982)) (President's alternative plan for federal pay adjustment may be disapproved by resolution of either House).

²² See, e.g., International Security Assistance Act of 1977, Pub. L. No. 95-92, § 16, 91 Stat. 614, 622 (codified at 22 U.S.C. § 2753(d)(2) (Supp. V 1981)) (except in a presidentially certified emergency, Congress by concurrent resolution may disapprove of certain transfers of defense equipment or services); Energy Security Act, Pub. L. No. 96-294, § 129(a)(1), 94 Stat. 611, 652 (1980) (codified at 42 U.S.C. § 8725(a)(1) (Supp. V 1981)) (amendments substantially altering the use of funds under the comprehensive strategy of the Synthetic Fuels Corporation must be approved by concurrent resolution).

²³ See, e.g., Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, § 1326(a), 94 Stat. 2371, 2488 (1980) (codified at 16 U.S.C. § 3213(a) (1982)) (approval by joint resolution of withdrawals of public lands covering more than 5000 acres in the aggregate); Crude Oil Windfall Profits Tax Act of 1980, Pub. L. No. 96-223, § 402, 94 Stat. 229, 301 (codified at 19 U.S.C. § 1862(e) (1982)) (disapproval by joint resolution of a presidential action to adjust imports of petroleum or petroleum products); Education Amendments of 1980, Pub. L. No. 96-374, § 248, 94 Stat. 1367, 1389 (codified at 20 U.S.C. § 1047(g) (Supp. V 1981)) (approval by joint resolution of any design for a national periodical system).

²⁴

Typically the way the device has come into being is that Congress and the President reach an agreement that the executive will be granted a specific power, which would not exist except for the enactment of the law, and Congress ties a limitation to that delegation—that the executive decision will be subject to a form of congressional nullification.

129 CONG. REC. H4824 (daily ed. June 29, 1983) (statement of Rep. Moakley (D Mass.))

A recent commentator has described the mechanics of a veto provision:

[The legislative veto] enables Congress, by action short of enactment of new legislation, to preclude implementation of proposed executive or administrative actions which have been advanced pursuant to statutory authority The congressional veto customarily takes effect in the following manner. Congress enacts a statute, either signed by the President or passed over his veto, requiring implementation by the executive or an administrative agency. Pursuant to a delegation of authority in the enabling statute, an affected agency must submit to Congress whatever executive orders, rules, regulations or directives it proposes to implement the stated congressional policy. If at the expiration of a specified time period, usually thirty to sixty days, no disapproval action is taken by Congress, the proposed action becomes effective.²⁵

The resolutions of approval or disapproval cannot be amended in committee or on the floor.²⁶ This characteristic, along with the mandated time period within which Congress must consider the issue, permits a large and diversified legislature to make judgments efficiently.

The congressional veto was first employed in the government reorganization acts in the first half of this century.²⁷ More than 200 laws containing over 350 separate congressional veto provisions have been enacted in the last half-century.²⁸ Although legislative veto provisions were adopted sparingly in earlier years, the number of acts containing such provisions increased markedly during the 1970's.²⁹ For example, in the Ninety-sixth Congress alone, legislative veto provisions were included in thirty-three statutes.³⁰

Congress has been modest in its exercise of the veto. Since 1932, Congress has passed approximately 125 resolutions over-

²⁵ Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323, 323-24 (1977).

²⁶ See, e.g., Energy Security Act, Pub. L. No. 96-294, § 129, 94 Stat. 611, 652 (1980) (codified at 42 U.S.C. § 8725 (Supp. V 1981)). See also the discussion in HOUSE COMM. ON RULES, EXPORT ADMINISTRATION AMENDMENTS OF 1983, H.R. REP. NO. 257, 98th Cong., 1st Sess. 3-4 (1983) (questioning such limitations).

²⁷ See *supra* note 7 and accompanying text. For a discussion of the development of the modern legislative veto see Chadha, 103 S. Ct. at 2793-96 (White, J., dissenting).

²⁸ C. Norton, Data on and Examples of Congressional Disapproval of Rules and Regulations, Congressional Research Service Report (July 8, 1983).

²⁹ *Id.*

³⁰ 127 CONG. REC. S2575 (daily ed. Mar. 23, 1982) (list of congressional veto laws enacted by the 96th Congress).

turning presidential or administrative agency actions.³¹ Of these, sixty-six have been rejections of presidential requests under the 1974 Congressional Budget and Impoundment Control Act³² for deferrals of spending authority, and twenty-four have been disapprovals of executive reorganization plans.³³

The creation and use of the veto mechanism was a direct response to increasingly broad congressional delegations of authority to administrative agencies. The delegation of congressional power to the heads of territories by the Congress of 1804³⁴ can be seen as a decision by that Congress that the day-to-day administration of the nation's territories and the concomitant requirement of rulemaking would have been an inefficient use of its limited time. Similarly, the burdens inherent in governing a complex industrialized society have led Congress to increase its delegation of rulemaking authority to the heads of administrative agencies.³⁵ As Congress has increasingly resorted to statutes delegating authority, so has it attempted to preserve the legislative branch's role as the supreme lawmaking and policy-directing body of government through the legislative veto.

By declaring all uses of the legislative veto constitutionally invalid, *Chadha* dismantled this highly evolved political system.³⁶ The specific question in *Chadha* was the constitutional validity of section 244(c)(2) of the Immigration and Nationality Act, which authorizes either House of Congress, by resolution, to invalidate the decision of the executive branch (pursuant to authority delegated by Congress to the Attorney General) to allow a particular deportable alien to remain in the United States.

The Court held the congressional veto provision in section 244(c)(2) to be unconstitutional.³⁷ The Court's rationale was based upon the constitutional design for the separation of powers.³⁸ The Court reasoned that "the prescription for legislative action in Art. I, §§ 1, 7 represents the Framers' decision that the legislative power of the Federal government be exercised in

³¹ Norton, *supra* note 28.

³² Pub. L. No. 93-344, § 1013, 88 Stat. 297, 334-35 (codified at 2 U.S.C. § 684 (1982)).

³³ Norton, *supra* note 28.

³⁴ See *supra* note 15 and accompanying text.

³⁵ See *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940); see also *infra* text accompanying notes 97-103.

³⁶ See *supra* note 3 and accompanying text.

³⁷ *Chadha*, 103 S. Ct. at 2788.

³⁸ *Id.* at 2781-84.

accord with a single, finely wrought and exhaustively considered, procedure."³⁹

The Court considered the action of the House of Representatives under section 244(c)(2) to be essentially legislative in purpose and effect.⁴⁰ The challenged resolution, therefore, was subject to the procedural requirements of Article I, Sections 1, 7, for legislative action: passage by a majority of both Houses and presentment to the President.⁴¹

The Court concluded its opinion by forecasting the negative effects its decision would have upon the efficiency of government:

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President. . . . With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.⁴²

The Supreme Court may consider the legislative procedure to be "clumsy" and "inefficient," but that perceived awkwardness results only when strict constitutional formalism is forced upon the structure of the government. The legislative process has always included procedures that serve efficiency and preserve the basic principles upon which the Constitution is founded: the principles of accountability and representative legislation. The legislative veto, as evolved from the laying procedure, reinforces those principles within the framework of the Constitution.

II. THE PROPOSED AMENDMENT

On July 25, 1983, S.J. Res. 135 was introduced in the Senate.⁴³ This joint resolution would amend the Constitution specifically

³⁹ *Id.* at 2784.

⁴⁰ *Id.* at 2785-86.

⁴¹ *Id.* at 2787.

⁴² *Id.* at 2788 (citations omitted).

⁴³ S.J. Res. 135, 98th Cong., 1st Sess., 129 CONG. REC. S11,015, S11,017 (daily ed. July 27, 1983). The amendment was referred to the Senate Committee on the Judiciary.

to permit the use of the congressional veto. The proposed amendment would restore the balance of power that existed among the branches of government prior to *Chadha*. The text of the amendment is concise.

The joint resolution states:

Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled, (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission by the Congress:

"ARTICLE—

"Section 1. Executive action under legislatively delegated authority may be subject to the approval of one or both Houses of Congress, without presentment to the President, if the legislation that authorizes the executive action so provides."

This amendment reinforces the full powers granted to Congress under the Necessary and Proper Clause.⁴⁴ Of this provision, Madison wrote in *The Federalist*:

The sixth and last class [of provisions] consists of the several powers and provisions by which efficacy is given to all the rest.

1. "Of these the first is the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States."

Few parts of the Constitution have been assailed with more intemperance than this; yet on a fair investigation of it, no part can appear more compleatly invulnerable. Without the *substance* of this power, the whole Constitution would be a dead letter.⁴⁵

The proposed amendment explicitly permits Congress, in accordance with the broad grant of power in the Necessary and Proper Clause, to utilize a legislative procedure necessary "to respond to contemporary needs without losing sight of fundamental democratic principles."⁴⁶

The first phrase of the amendment, "Executive action under legislatively delegated authority," encompasses only those ac-

⁴⁴ U.S. CONST. art. I, § 8, cl. 18.

⁴⁵ THE FEDERALIST NO. 44, at 302-03 (J. Madison) (J. Cooke ed. 1961) (emphasis original).

⁴⁶ *Chadha*, 103 S. Ct. at 2798 (White, J., dissenting).

tions taken to execute a law pursuant to a legislative delegation of authority. "Executive action" under this amendment includes both action and failure to act, whether by executive or independent agencies or by the President. Thus, if Congress appropriates funds and the President impounds those funds, the impoundment may be subject to the approval of Congress.

Under the separation of powers doctrine, Congress may not subject the constitutionally authorized powers of the executive branch to its legislative approval.⁴⁷ Constitutionally authorized executive action includes the power to pardon criminals⁴⁸ and the general administrative control of those executing the laws, including the power of removal of executive officers.⁴⁹ Furthermore, after Congress enacts a statute, the executive branch is constitutionally empowered to apply the law of that statute. In *Myers v. United States*, the Supreme Court stated that "Article II grants to the President the executive power of the Government, . . . a conclusion confirmed by his obligation to take care that the laws be faithfully executed."⁵⁰

Yet, unless Congress legislates, the executive generally will have no power to act. The authority to apply executive power and the manner in which the executive power may be applied are dictated by the statute itself. As Justice Holmes stated, "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power."⁵¹ It is the exercise of this power under the statute that may be subjected to Congress's approval. In his dissent in *Chadha*, Justice White pointed out, "*The Steel Seizure Case* resolved that the Article II mandate for the President to execute the law is a directive to enforce the law which Congress has written."⁵² Under this amendment, as long as Congress does not interfere with or encroach upon the constitutional powers of the executive, Con-

⁴⁷ "The separation of powers doctrine has heretofore led to the invalidation of government action only when the challenged action violated some express provision in the Constitution." *Id.* at 2809 (White, J., dissenting); see also *id.* at 2790 (Powell, J., concurring).

⁴⁸ U.S. CONST. art. II, § 2, cl. 1; see also *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867); *United States v. Wilson*, 32 U.S. (7 Pet.) 150 (1833).

⁴⁹ See *Myers v. United States*, 272 U.S. 52 (1926).

⁵⁰ *Id.* at 163-64.

⁵¹ *Id.* at 177 (Holmes, J., dissenting).

⁵² 103 S. Ct. at 2809 (White, J., dissenting); see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

gress may condition its delegations of power through the legislative veto device.

The amendment's phrase "may be subject to approval" envisions that Congress may choose, as it has in the past, what action it wishes to subject to approval. "Approval" may be demonstrated by conditioning the action of the executive branch upon affirmative congressional acceptance, such as the passage of a simple resolution. "Approval" could also be expressed by permitting executive action to become effective unless Congress passes a disapproval measure. Under this amendment, Congress may select whatever means it wishes to employ to express approval, as long as the procedure for approval is clearly delineated in the enabling act. The committee veto thus remains a viable option as a means of expressing approval.

The phrase "of one or both Houses of Congress" clearly permits a one-House veto. Furthermore, the one-House veto procedure is consistent with the bicameral requirement of the Constitution. A properly constructed legislative disapproval provision is not a veto by Congress of action that the executive branch is authorized to take, but rather is a rejection by Congress of a recommendation that the executive branch is authorized or directed to make. The executive action essentially is a proposal for legislation. As with other proposals for legislation, the disapproval of but a single House is all that is required to prevent its passage. Since approval is indicated by the failure of both Houses to veto the proposal, the one-House veto functionally is in harmony with the requirement of bicameral approval contained in the Constitution.⁵³

The phrase "without presentment to the President" clearly allows all the veto mechanisms the Supreme Court struck down in *Chadha*. Under this amendment, the presentment requirement will have been fulfilled when the enabling legislation containing the veto provision passed Congress and was signed by the President or passed over his veto. This phrase would render moot the Supreme Court's more stringent interpretation of presentment.

There is a noteworthy parallel between legislation containing a legislative veto provision and legislation authorizing the appointment of officers of the federal government. If Congress by law vests the appointment of inferior officers in the President

⁵³ See *Chadha*, 103 S. Ct. at 2807-08 (White, J., dissenting).

alone, it may not, without further legislation, assert a power in the Senate to advise and consent to such appointments. But Congress can initially reserve such a power to the Senate.⁵⁴ Congress in this way has the constitutional power to choose to participate or not to participate in the appointment process.

Similarly, under the amendment, Congress—in a statute presented to the President and if necessary, passed over his veto—may authorize agencies to propose or recommend rules but retain for itself the power to disapprove any such rules and regulations. Such a provision would not subvert the President's veto power. Congress has simply determined the extent of its own participation under the broad scope of choice provided by this amendment and in keeping with the spirit of the Necessary and Proper Clause of the Constitution.⁵⁵

The concluding phrase "if the legislation that authorizes the executive action so provides" requires that the approval mechanism be in the legislation enabling the executive branch to act. As before, Congress can decide whether to include a legislative veto procedure in a statute delegating authority. A post-hoc veto, however, cannot be applied to previously unlimited delegations of authority.⁵⁶

This amendment permits Congress to utilize fully the congressional veto device. In effect, Congress will be permitted to proceed as it has in the past. The amendment simply gives the legislative veto the constitutional approval which the Supreme Court declared does not presently exist.

III. THE SEPARATION OF POWERS

The American system of government, under the Constitution, is premised upon the doctrine of separation of powers. While the Constitution distributes authority, it does not mandate absolute separation of power. Within this constitutional framework, the theory of separation of powers serves a dual purpose. First, the Constitution divides governmental power among the three branches in order to prevent abuses of power. Second, power is distributed among the three branches of government

⁵⁴ U.S. CONST. art. II, § 2, cl. 2.

⁵⁵ U.S. CONST. art. I, § 8, cl. 18.

⁵⁶ On the other hand, Congress may amend the authorizing statute to provide for a legislative veto mechanism.

in order to provide for a more efficient government.⁵⁷ In short, the Framers established a blueprint for governing that would maximize both protection from governmental abuses and economy in governmental action. Because the legislative veto is an extension of the accountability and efficiency aspects of this doctrine, this amendment fully accords with the pre-existing constitutional framework. The *Chadha* decision, with its literal reading of the Article I requirements, has not altered or diluted the separation of powers rationale that has persuaded Congresses, for over fifty years, to adopt and utilize the legislative veto. By expressly providing for a legislative veto in the Constitution, this amendment reinforces that doctrine.

Montesquieu, in his famous exposition of the separation of powers doctrine in *The Spirit of Laws*, states that "[i]n every government there are three sorts of power: the legislative; the executive; . . . [and the judiciary]."⁵⁸ The Framers incorporated the principle of separation of powers into the Constitution by distributing authority among the three branches of government: Article I vests the legislative power in the Congress; Article II vests the executive power in the President; and Article III vests the judicial power in the Supreme Court and such inferior courts as the Congress may establish.

At the same time, the Framers did not intend for the distribution of authority among the three branches of the government to be an absolute separation of the three powers. In *The Federalist* No. 47, Madison maintained that the preservation of liberty does not require the total separation of the legislative, executive, and judiciary departments from each other. Madison began his discussion of separation of powers by stating a political maxim: "The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."⁵⁹ Madison then pointed out that Montesquieu viewed the British system and its characteristic principle of separation of powers as the model of political liberty. Yet, under that system of government, Madison wrote, "the legislative, executive and judiciary departments are by no means totally separate and distinct from each

⁵⁷ For a discussion of the efficiency aspects of the separation of powers principle, see Fisher, *The Efficiency Side of Separated Powers*, 5 J. AM. STUD. 113 (1971).

⁵⁸ C. MONTESQUIEU, *THE SPIRIT OF THE LAWS* 151 (T. Nugent trans. 1949).

⁵⁹ *THE FEDERALIST* No. 47, at 324 (J. Madison) (J. Cooke ed. 1961).

other."⁶⁰ Madison continued, "[Montesquieu's meaning] can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted."⁶¹ In *The Federalist* No. 48, Madison further argued "that unless these departments be so far connected and blended, as to give to each a constitutional controul over the others, the degree of separation which the maxim requires as essential to a free government, can never in practice, be duly maintained."⁶²

Under the Constitution, there are no "watertight compartments"⁶³ of power.⁶⁴ Instead, there is an overlap of the three powers among the different branches of government. For example, the chief of the executive branch, the President, exercises legislative power when he vetoes acts of Congress⁶⁵ or recommends legislative proposals for action. He may also act on his judicial prerogative and pardon citizens found guilty of crimes.⁶⁶ Congress acts in an executive manner when the Senate participates in the process of appointment of executive officers of the government⁶⁷ and when it ratifies treaties negotiated by the executive branch.⁶⁸ Furthermore, the House of Representatives may initiate⁶⁹ and the Senate conduct the judicial process of impeachment.⁷⁰ The Constitution also makes Congress the judge of the election and qualification of its members.⁷¹

The authors of the Constitution believed that by separating the powers and distributing them among three branches of government, each branch would contain any tendency to usurp power by either of the other branches. They thus created a separation of powers to serve as a complete system of checks and balances that would restrain abuses by any branch of the

⁶⁰ *Id.* at 325.

⁶¹ *Id.* at 325-26 (emphasis original).

⁶² *THE FEDERALIST* No. 48, at 332 (J. Madison) (J. Cooke ed. 1961).

⁶³ *Springer v. Phillipine Islands*, 277 U.S. 189, 211 (1928) (Holmes, J., dissenting).

⁶⁴ See *Buckley v. Valeo*, 424 U.S. 1 (1976), which stated that the Framers "saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." *Id.* at 121.

⁶⁵ U.S. CONST. art. I, § 7, cls. 2-3.

⁶⁶ U.S. CONST. art. II, § 2, cl. 1.

⁶⁷ U.S. CONST. art. II, § 2, cl. 2.

⁶⁸ *Id.*

⁶⁹ U.S. CONST. art. I, § 2, cl. 5.

⁷⁰ U.S. CONST. art. I, § 3, cl. 6.

⁷¹ U.S. CONST. art. I, § 5, cl. 1; see also *Kilbourne v. Thompson*, 103 U.S. 168, 190 (1880).

government. As one modern commentator has observed, "[t]yranny or arbitrariness does not stem from blended power; it is more likely to stem from unchecked power."⁷²

Madison wrote that if Congress should exercise powers not warranted under the Constitution, the "success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts"⁷³ The above quotation reveals that the Framers, in their day, identified the legislative branch as especially likely to encroach upon the powers of the coordinate branches. Yet, as one commentator has noted:

The Framers' day . . . is not our day. The branch that now threatens to expand beyond its proper place, assert the proponents of the legislative veto, is the executive branch. Among other causes, the rapid growth of administrative agencies over the last half century has contributed to executive exercise of a wide array of powers that more traditionally lodged within the other two branches.⁷⁴

This growth of power in the executive branch did not come in one day, but rather developed slowly in conjunction with the growth of the modern administrative state. The legislative veto enables Congress to reduce the concentration of power in the executive branch, in keeping with the intent of the Framers. As stated in *The Federalist*, "[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others."⁷⁵ The legislative veto empowers the legislative branch to counteract the ambition of the executive branch. The veto is a "means of defense, a reservation of ultimate authority necessary if Congress is to fulfill its designated role under Article I as the nation's lawmaker."⁷⁶

"When the Executive acts, it presumptively acts in an executive or administrative capacity as defined in Art. II."⁷⁷ The Article II executive functions respecting legislation, including the Section 3 duties of the President to "take Care that the Laws

⁷² I K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2:6, at 81 (2d ed. 1978).

⁷³ THE FEDERALIST No. 44, at 305 (J. Madison) (J. Cooke ed. 1961).

⁷⁴ Mailin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253, 263 (1982).

⁷⁵ THE FEDERALIST No. 51, at 349 (J. Madison) (J. Cooke ed. 1961).

⁷⁶ *Chadha*, 103 S. Ct. at 2796 (White, J., dissenting).

⁷⁷ *Id.* at 2785.

be faithfully executed,"⁷⁸ are merely duties to execute "the laws consistent with the provisions therefor made by Congress."⁷⁹ The Supreme Court, in the past, has made it clear that the executive provisions of Article II primarily empower the President simply to carry out the laws enacted by Congress.⁸⁰ "The President's power, if any, to issue an order must stem either from an act of Congress or from the Constitution itself."⁸¹ Moreover, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."⁸² This "power to execute the laws starts and ends with the laws Congress has enacted."⁸³

In short, the President has nothing to execute unless legislation on that subject is passed by Congress or unless he is acting under his constitutional power as Commander in Chief, his power to grant pardons and reprieves, his power to receive ambassadors, or his power to make treaties. Under this amendment, "[u]nless Congress invades a power specifically granted to the President in the Constitution . . . , or fails to provide guidelines, no separation-of-powers problem arises from [a delegation of power with a legislative veto provision attached]."⁸⁴

The legislative veto mechanism originates from the constitutional concept that Congress will be responsible for legislation. Legislative power is the authority to make laws.⁸⁵ One article described the characteristics of lawmaking:

Several attributes of legislative authority may be deduced by reference to what is perhaps the core of Congress' powers—the authority to enact laws. The essence of law-making is the issuance of rules that have the substantive authority to regulate conduct or direct the operation of government. These rules take effect prospectively through standards of general application. They impose legal sanctions or constitute legal authorization to take certain actions. If not unconstitutional, laws bind courts as well as other branches of government If characterized by any single feature, legislative power involves the formulation of policy, as opposed to the actual implementation of law.⁸⁶

⁷⁸ U.S. CONST. art. II, § 3.

⁷⁹ *Myers v. United States*, 272 U.S. 52, 247 (1926) (Brandeis, J., dissenting).

⁸⁰ *See, Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁸¹ *Id.* at 585.

⁸² *Id.* at 587.

⁸³ *Id.* at 633 (Douglas, J., concurring).

⁸⁴ *Atkins v. United States*, 556 F.2d 1028, 1068 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978).

⁸⁵ *See Springer v. Philippine Islands*, 277 U.S. 189, 209 (1928).

⁸⁶ Note, *Constitutionality of the Legislative Veto*, 13 HARV. J. ON LEGIS. 593, 603-04 (1976) (footnotes omitted).

Agency rules and regulations—presently immunized by *Chadha* from direct congressional oversight—have similar attributes. In his dissent in *Chadha*, Justice White described the force of administrative rulemaking as equivalent to that of lawmaking.⁸⁷ Without the legislative veto device, the ability to control this administrative "lawmaking," especially by independent agencies, is greatly diminished.⁸⁸ The doctrine of separation of powers urgently requires the use of the legislative veto as a check upon the actions of these regulatory agencies.

The encroachment upon congressional lawmaking by such extra-legislative rulemaking should not be dismissed lightly. Senator Charles E. Grassley (R-Iowa) recently testified before Congress: "For every statute created by Congress in recent years the unelected bureaucracy has cranked out 18 regulations As noted by Murray Weidenbaum, former Chairman of the President's Council of Economic Advisors, federal regulations cost the U.S. economy about \$126 billion annually."⁸⁹

The legislative veto provides Congress with a direct means of oversight over the rules and regulations that are promulgated by executive bodies. This preserves the doctrine, under the theory of separation of powers, that no power go unchecked. It also preserves Congress's role as the lawmaking body under the Constitution.

⁸⁷

There is no question but that agency rulemaking is law making in any functional or realistic sense of the term. The Administrative Procedure Act, 5 U.S.C. § 551(4) provides that a "rule" is an agency statement "designed to implement, interpret, or prescribe law or policy." When agencies are authorized to prescribe law through substantive rulemaking, the administrator's regulation is not only due deference, but is accorded "legislative effect." . . . These regulations bind courts and officers of the federal government, may pre-empt state law, . . . and grant rights to and impose obligations on the public. In sum, they have the force of law.

Chadha, 103 S. Ct. at 2802 (White, J., dissenting) (citations omitted).

⁸⁸

Congress, with the President's consent, characteristically empowers the agencies to issue regulations. These regulations have the force of law without the President's concurrence; nor can he veto them if he disagrees with the law that they make. The President's authority to control independent agency lawmaking, which on a day-to-day basis is non-existent, could not be affected by the existence or exercise of the legislative veto. To invalidate the device, which allows Congress to maintain some control over the law-making process, merely guarantees that the independent agencies, once created, for all practical purposes are a fourth branch of the government not subject to the direct control of either Congress or the executive branch.

Process Gas Consumers Group v. Consumer Energy Council of America, 103 S. Ct. 3556, 3558 (1983) (White, J., dissenting).

⁸⁹ *Legislative Veto: Hearings on the Supreme Court's Decision in INS v. Chadha Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983) (in press) (statement of Sen. Grassley (R-Iowa)) [hereinafter cited as *Hearings*].

The legislative veto also establishes a check upon the abuse of power by administrative agencies. With the veto, Congress can force accountability while retaining the flexibility of action which the broad delegation of legislative authority permits. At the same time, Congress can continue to oversee the overall legislative policy of the government. The requirements of checks and balances dictate that Congress have the power to restrict abuses by the executive branch. With ineffective checks on that power, the executive branch certainly will attempt to achieve as great an authority as possible. Montesquieu wrote that "constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go To prevent this abuse, it is necessary from the very nature of things that power should be a check to power."⁹⁰ As Madison put it, "You must first enable the government to controul the governed; and, in the next place, oblige it to controul itself."⁹¹

The veto mechanism is a controlling device in the government. The use of a legislative veto makes the legislative branch rightfully accountable for the laws of the nation. This is important as citizens look to Congress for relief from the oppressive measures promulgated by the administrative arm of the government.

The legislative veto was rarely used before it was found constitutionally impermissible. This does not mean that the legislative veto was an ineffective instrument, serving only to salve Congress's conscience for its generous delegations of power. For, although it was rarely exercised, it does not follow that it would never be exercised. The very threat of this flex of legislative muscle often seemed to temper otherwise extreme action by the executive branch. For instance, a threatened use of the veto figured prominently in the recent debate on the sale of military equipment to Saudi Arabia.⁹²

In addition to creating a system of checks and balances, power is distributed among the branches in order to provide for a more efficient government. In fact, the failure of the Articles of Confederation to provide an efficient, workable system of government led to the demands for a new constitution. Under the Articles of Confederation, power was vested only in the legis-

⁹⁰ C. MONTESQUIEU, *supra* note 58, at 150.

⁹¹ THE FEDERALIST NO. 51, at 349 (J. Madison) (J. Cooke ed. 1961).

⁹² See 127 CONG. REC. 512,171-204 (daily ed. Oct. 27, 1981).

lature.⁹³ The net effect was an inefficient government suffering from paralysis.⁹⁴ In constructing the new government, the Framers sought economy of government by division of authority and specialization of duties.

In *The Federalist*, Hamilton described the problems of governing under the Articles of Confederation⁹⁵ and then advocated an effective centralized government.⁹⁶ The Framers applied the separation of powers doctrine to create an efficient government.⁹⁷ They realized that complete separation of authority would only increase the problem of inefficiency.

The demands of governing in modern society have forced Congress to delegate authority and effectively intermix the functions of the three branches of government. As a result, the government does not have sharply defined boundaries around each of the coordinate branches. Instead, the boundaries between each branch are fixed "according to common sense and the inherent necessities of governmental co-ordination."⁹⁸ As Justice Jackson stated, "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.

⁹³ ARTICLES OF CONFEDERATION art. IX.

⁹⁴ See Fisher, *supra* note 57.

⁹⁵

In our case, the concurrence of thirteen distinct sovereign wills is requisite under the confederation to the complete execution of every important measure, that proceeds from the Union. It has happened as was to have been foreseen. The measures of the Union have not been executed; and the delinquencies of the States have step by step matured themselves to an extreme; which has at length arrested all the wheels of the national government, and brought them to an awful stand.

THE FEDERALIST No. 15, at 98 (A. Hamilton) (J. Cooke ed. 1961).

⁹⁶

The result of these observations to an intelligent mind must be clearly this, that if it be possible at any rate to construct a Foederal Government capable of regulating the common concerns and preserving the general tranquility, it must be founded, as to the objects committed to its care, upon the reverse of the principle contended for by the opponents of the proposed constitution. It must carry its agency to the persons of the citizens. It must stand in need of no intermediate legislation; but must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions. . . . It must in short, possess all the means and have a right to resort to all the methods of executing the powers, with which it is entrusted, that are possessed and exercised by the governments of the particular States.

THE FEDERALIST No. 16, at 102-03 (A. Hamilton) (J. Cooke ed. 1961).

⁹⁷ See Miller, *An Inquiry into the Relevance of the Intentions of the Founding Fathers, With Special Emphasis Upon the Doctrine of Separation of Powers*, 27 ARK. L. REV. 583 (1973). Miller states that "[e]fficiency was stressed as the principal reason for establishing an executive independent from the legislature by, among others, John Adams, Thomas Jefferson, John Jay and James Wilson." *Id.* at 588.

⁹⁸ *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928).

It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."⁹⁹

The benefit of coordination of effort by the three branches of government has led directly through the process of delegation of legislative powers to the creation of modern administrative government. "Delegation by Congress," said the Supreme Court in 1940, "has long been recognized as necessary in order that the exertion of legislative power does not become a futility . . . [T]he burdens of minutiae would be apt to clog the administration of the law and deprive the agency of that flexibility and dispatch which are its salient virtues."¹⁰⁰

Many advantages result from delegating the power to solve a complex problem to an administrative agency. An agency created to solve a problem possesses or obtains accurate and comprehensive knowledge of the problem. Its solutions exhibit a steady and systematic adherence to the same views concerning the problem. Decisionmaking with dispatch is facilitated. In short, specialization promotes efficiency that could not exist in the congressional bodies.

In the past fifty years, delegation to administrative agencies has increased dramatically. As Justice Jackson stated:

The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decision apart. They also have begun to have important consequences on personal rights . . . They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.¹⁰¹

The delegation of rulemaking authority to agencies should be thought of as "unfinished law which the administrative body must complete before it is ready for application."¹⁰² Congress

⁹⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

¹⁰⁰ *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940) (citations omitted) (upholding the constitutionality of independent agency rulemaking under congressional delegation).

¹⁰¹ *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

¹⁰² *Id.* at 485 (Jackson, J., dissenting) (footnote omitted). Jackson continued:

In a very real sense the legislation does not bring to a close the making of the law. The Congress is not able or willing to finish the task of prescribing a positive and precise legal right or duty by eliminating all further choice between policies, expediences or conflicting guides, and so leaves the rounding out of its command to another, smaller and specialized agency.

can only provide broad outlines because it does not know what the agency will encounter. But Congress cannot, for that reason alone, lose all voice in the rulemaking that the agency performs. Therefore, Congress attaches a legislative veto provision to those delegations which it deems too broad to go unchecked.

The delegation of rulemaking authority results from cooperation between Congress and the President. The President usually will initiate the cooperative process by recommending the establishment of an agency or the expansion of the authority of an existing agency in order to handle a specific problem. Members of the President's staff will then meet with their congressional counterparts to reach a compromise on the details of the legislation.

Without a veto provision in the enabling legislation, this cooperation between the President and Congress often ends with the passage of the enabling statute. On the other hand, the cooperation between the executive and legislative branches of government does not end with the passage of a statute containing a veto provision. Rather, the cooperation continues when the executive branch presents to Congress its recommendations under the statute. The requirement of congressional concurrence will lead to continued cooperation and will "have a powerful, though in general a silent operation."¹⁰³ Moreover, the inclusion of a legislative veto provision serves as an excellent check on partisanship in the delegates.

Just as the executive is made more cooperative by the congressional checks in the appointment process, so the executive will be made more cooperative by a congressional veto provision in the rulemaking process. As Hamilton pointed out in *The Federalist* No. 76:

It will readily be comprehended, that a man, who had himself the sole disposition of offices, would be governed much more by his private inclinations and interests, than when he was bound to submit the propriety of his choice to the discussion and determination of a different and indepen-

... Because Congress cannot predetermine the weight and effect of the presence or absence of all the competing considerations or conditions which should influence decisions regulating modern business, it attempts no more than to indicate generally the outside limits of the ultimate result and to set out matters about which the administrator must think when he is determining what within those confines the compulsion in a particular case is to be.

Id. at 485-86 (Jackson, J., dissenting).

¹⁰³ *THE FEDERALIST* No. 76, at 513 (A. Hamilton) (J. Cooke ed. 1961) (discussing advice and consent of Senate in the appointment process).

dent body; and that body an entire branch of the Legislature. The possibility of rejection would be a strong motive to care in proposing.¹⁰⁴

In this way, the veto works to produce the best proposals for regulation from the administrative bodies.

With a legislative veto, Congress can delegate without losing its voice in the delegated matter and can at the same time approach a problem without becoming overburdened by the weight of information generated while researching the problem. For example, Congress may not have much information about the technicalities of providing for clean water or a safe workplace at the time it passes authorizing legislation. The delegatee agency, however, develops that information through adjudication on a case-by-case basis or through hearings specifically convened to develop the expertise required to write the regulations to implement the statutes Congress enacts. The veto process permits Congress to draw on the developed expertise of the delegatee agency when the proposed regulations are presented to Congress. With a legislative veto provision, Congress gets the benefits of delegation as well as the continued oversight of the delegatee's exercise of delegated legislative authority.

In addition to controlling the use of delegated legislative power by another arm of the government, the legislative veto enhances the efficiency of the congressional branch of the government. The legislative veto procedure often promotes better-informed deliberation than the regular legislative process. "Under the legislative veto procedure, members of Congress act in the presence of specific and contemporary facts about a pending administrative proposal. Debates are often sharply focused and carefully considered."¹⁰⁵ Recent examples of more extensive deliberation by Congress include the debates on the sale of nuclear fuel to India in 1980,¹⁰⁶ on the sale of military equipment to Saudi Arabia in 1981,¹⁰⁷ and on the used-car rule promulgated by the Federal Trade Commission in 1982.¹⁰⁸

Efficiency in government militates against permitting agency regulations to go into effect only to be revoked or replaced by later congressional actions. The inconsistency and uncertainty

¹⁰⁴ *Id.*

¹⁰⁵ *Hearings, supra* note 89 (statement of Louis Fisher, Congressional Research Service).

¹⁰⁶ See 126 CONG. REC. S13,249-88 (daily ed. Sept. 24, 1980).

¹⁰⁷ See 127 CONG. REC. S12,171-204 (daily ed. Oct. 27, 1981).

¹⁰⁸ See 128 CONG. REC. S5380-402 (daily ed. May 18, 1982).

this would create for those governed by the regulations would be devastating. Such unsound governing most assuredly would burden the commerce of the nation.

The congressional veto ensures that the delegated power is exercised as Congress intended. Yet it does add another level to the legislative process, a layer that causes delay. This would seem to militate against any efficiencies Congress was seeking when it delegated authority in the first place. The delay, however, in practice only slightly expands the legislative process. The standard period for approval, thirty or sixty days, does not cause excessive delays. Indeed, the additional time for approval is relatively short compared to the time required for passage of a bill that would alter or eviscerate a regulation promulgated by an agency.¹⁰⁹

Subjecting the expert decisionmaking of an agency to congressional review is also necessary in order to maintain public support for the agency's policies. The congressional process allows for an interaction between what the regulator proposes and what the American people, speaking through Congress, are willing to support. Without a blend of those two, no strong policy may ever be carried out.

For the private individual, the legislative veto procedure is "among the simplest and most direct methods of introducing accountability to the federal regulatory structures and enhancing Congressional responsiveness to the public's demands for sensible government."¹¹⁰ For example, small businesses do not have the time or the resources to work directly with regulatory agencies or even to go to court to challenge unfair or inequitable regulations. With a legislative veto procedure, "the small business owner could take his case directly to his senators or representative."¹¹¹ Congress would then be able to correct any regulatory excesses evidenced by the complaint of the small business owner. This reinforces Congress's role as the supreme legislative body of government.

¹⁰⁹ For example, in 1973 the Department of Transportation promulgated its unpopular regulation requiring seatbelt interlock systems in all new automobiles. 38 Fed. Reg. 16,072 (1973) (amending 49 C.F.R. § 571.208 (1973)). Despite overwhelming opposition to the regulation, it took Congress more than a year after the regulation took effect to reverse it by legislation. See Motor Vehicles and School Bus Safety Amendments of 1974, Pub. L. No. 93-492, § 109, 88 Stat. 1470, 1482 (codified at 15 U.S.C. § 1410b (1976)).

¹¹⁰ *Hearings*, *supra* note 89 (statement of James McKevitt, Director of Fed. Legislation, Nat'l Fed'n of Indep. Business).

¹¹¹ *Id.*

It may be argued that a legislative veto would inappropriately interfere with executive functions and would serve only to give Congress an improper influence over the executive branch. But Congress has some power of interference and influence without the legislative veto.¹¹² The legislative veto, however, provides a much more effective and direct technique to control the exercise of delegated authority by the executive branch than do the other available alternatives, such as the threat of a bill to abolish an agency or restrict its jurisdiction. Furthermore, if what these critics mean by "influencing or interfering" with the executive is "restraining him," this is precisely what is intended.

Two commentators addressed the "problem" of congressional interference with the executive branch in this way:

To argue that the veto is unconstitutional because it interferes with execution is to assume that oversight which interferes with execution can be distinguished from oversight which does not; in short, that there is a "proper" kind of congressional oversight which does not interfere and an "improper" kind which does. As the brief survey of Congress' oversight weapons demonstrates, such a distinction cannot be maintained. Basically, all oversight interferes with execution; indeed, it cannot avoid doing so. When Congress passes a piece of amendatory legislation, reduces an appropriation, conducts an investigation, formally or informally requires prior reporting, criticizes administrators on the floor or contacts them on behalf of constituents, it involves itself in the administrative process and interferes with what has been going on or what would go on if it had not stepped into the process.¹¹³

There is nothing "improper" about the legislative veto. Under this amendment, the executive branch becomes a party to the act when the President signs the enabling legislation and a member of the executive branch administers the law. These two conditions combine to preserve the integrity of the executive branch and spare needless interferences by the legislative branch. Congress will only intervene when necessary.

The legislative veto is a complex tool that has proven its benefits over the years. The proposed amendment is fully consonant with the spirit of the Constitution and the principles underlying that document. Congress will be able to continue to

¹¹² See *Atkins v. United States*, 556 F.2d 1028, 1068 (Cl. Ct. 1977), cert. denied, 434 U.S. 1009 (1978).

¹¹³ Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467, 492-93 (1962).

delegate power in order to achieve efficient solutions to the problems at hand. Congress, however, may retain a control over that delegated power. As the Supreme Court stated, without the legislative veto, governmental processes will be "clumsy, inefficient, even unworkable" with "obvious flaws of delay, untidiness, and potential for abuse."¹¹⁴ This does not necessarily have to be so. The legislative veto that this amendment explicitly permits would change the Supreme Court's formulation of the legislative process to allow a more efficient, workable process.

IV. OTHER APPROACHES

Without passage of this constitutional amendment, Congress must resort to statutory mechanisms in order to overturn or preempt federal agency rules, to limit their impact, or to prevent or hinder their promulgation.¹¹⁵ These statutory mechanisms include: (1) direct override or preemption of rules; (2) modification of agency jurisdiction; (3) limitations in agency authorizations and appropriations; (4) extra-agency prior consultation requirements; and (5) advance notification requirements. While each of these statutory alternatives gives Congress some check over the exercise of delegated authority, none of these devices has proven as effective as the legislative veto.

—The most direct alternative to a legislative veto is a statutory override of the offending rule or action. This method ensures that the executive branch acts in accordance with Congress's intent. However, requiring Congress to enact a second piece of legislation in order to implement its intent is highly inefficient. Further legislation presents heavy demands on congressional resources, requires review and approval by the entire Congress, and must be signed by the President or his veto overridden. If the President chooses to veto this second bill, Congress could enforce the intent of its original act only by a two-thirds majority of both Houses. In addition, until the proposed legislation is adopted, a controversial agency rule remains in effect, in direct conflict with congressional intent.

Congressional experience during the Vietnam War demonstrated the difficulties involved in passing a second bill.

¹¹⁴ *Chadha*, 103 S. Ct. at 2788.

¹¹⁵ See generally Kaiser, *Congressional Action to Overturn Agency Rules: Alternatives to the "Legislative Veto,"* 32 AD. L. REV. 667 (1980).

The Vietnam war underscored the concern by Members of Congress that they might have to form extraordinary majorities in both Houses to control the President. Twice in 1973 Congress passed legislation to bring the war to a halt. Twice President Nixon vetoed these measures. On both occasions attempts in Congress to override the President were unsuccessful. The need to "enact a law" meant that the President could continue a war opposed by a majority in each House so long as he retained the support of a minority in a single chamber. Federal district judge Orrin Judd held that "It cannot be the rule that the President needs a vote of only one-third plus one of either House in order to conduct a war, but this would be the consequence of holding that Congress must override a Presidential veto in order to terminate hostilities which it has not authorized." It was precisely for that reason that Congress insisted on a concurrent resolution of disapproval in the War Powers Resolution of 1973.¹¹⁶

Even if Congress is able to enact corrective legislation, this probably will not occur until after the executive branch officials have acted or the agency rule has gone into effect. This creates further serious problems:

Post hoc substantive revision of legislation, the only available corrective mechanism in the absence of post-enactment review, could have serious prejudicial consequences; if Congress retroactively tampered with a price control system after prices had been set, the economy could be damaged and private rights seriously impaired; if Congress rescinded the sale of arms to a foreign country, our relations with that country would be severely strained; and if Congress reshuffled the bureaucracy after a President's reorganization proposal had taken effect, the results could be chaotic.¹¹⁷

As a second alternative, Congress could pass a statute altering the jurisdiction of a regulatory agency or expanding the exemptions from its authority, thereby affecting both existing and anticipated rules. This mechanism, however, requires Congress to restructure an agency or its powers whenever congressional intent is ignored. As a result, Congress would rarely utilize this option and would more likely overlook the agency's transgression.

¹¹⁶ *Hearings*, *supra* note 89 (statement of Louis Fisher, Congressional Research Service) (quoting *Holtzman v. Schlesinger*, 361 F. Supp. 553, 565 (E.D.N.Y.), *rev'd*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974)).

¹¹⁷ Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. Rev. 455, 464 (1977) (footnotes omitted).

Congress may also attempt to influence executive action through the budget process by prohibiting expenditures for enforcement of particular rules or by revoking funding discretion for rulemaking activity. These limitations prevent an agency from promulgating or implementing a rule during the authorization or appropriation period. The effectiveness of such authorization or appropriation restraints is limited, however, because certain types of budget expenditures are largely immune from control: borrowing and contract authority (or "backdoor spending"); permanent authorizations or appropriations; expenditures for off-budget agencies; and carry-overs of unexpended funds.

Moreover, congressional reduction of a specific appropriation account may not generate sufficient pressure to compel the executive branch to implement a policy that it wishes to ignore. The impoundment controversy of the 1970's demonstrated the ineffectiveness of appropriations as a substitute for the legislative veto.¹¹⁸

A similar, but nonstatutory, control involves the prior approval by designated congressional committees of agency "reprogramming" of funds above a dollar threshold from one program to another.¹¹⁹ The agency, however, can ignore the committee recommendation and spend the funds as appropriated in the lump-sum accounts. Generally, the agency will defer to the committee because it fears retribution in the form of budget cutbacks, line-itemization, or other sanctions.¹²⁰ As a result, this mechanism effectively acts as a committee veto. The informality of this procedure makes reprogramming a very dubious form of congressional control.

A fourth statutory mechanism would require agency consul-

¹¹⁸ See *id.*

¹¹⁹ See Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367, 374 (1977).

¹²⁰ *Hearings*, *supra* note 89 (statement of Louis Fisher, Congressional Research Service). Fisher goes on to state a recent example of reprogramming:

This type of legislative (or committee) veto operated this year when President Reagan wanted to reprogram \$60 million to El Salvador. The administration honored the reprogramming procedure, touching base with the authorizing and appropriations committees to secure their support. In a reprogramming request a month ago submitted by the Commerce Department, agency officials sought approval from the Appropriations Committees to shift one million dollars to another program. Technically and legally they could have spent this money without consulting the committees and obtaining their approval, but a bureau official admitted that "whatever the particulars of the legalities might be, one ignores appropriations subcommittees at one's own peril."

Id. (footnotes omitted).

tation with or review by congressional committees or other agencies.¹²¹ Such a procedure gives Congress only an indirect influence over proposals but has the salutary effect of broadening the agency's perspective during the decisionmaking process.

A fifth mechanism, which is similar to the consultation and review provisions, would require an agency to notify Congress or the appropriate congressional committee regarding proposed or final rules, usually within a specified period (e.g., thirty days) before the rules become effective.¹²² While such a provision enables committees to be more readily aware of forthcoming regulations and might spur negotiations between Congress and the agency prior to the effective date of the regulation, this mechanism also gives Congress only an indirect role in the rulemaking process. After the *Chadha* decision, both the advance notice and the consultation and review requirements could be used to disapprove a regulation only in conjunction with a joint resolution of Congress. Thus, Congress would have to produce a super-majority vote of both Houses, if faced with a President's veto, in order to invalidate an offending agency proposal or regulation. This is an extraordinary requirement for Congress to meet in order to get an agency to act as it intended.

Many nonstatutory controls are also available to Congress. A congressional committee could explore the matter in a public hearing. Congress could mandate specialized committee staff

¹²¹ See, e.g., Federal-Aid Highway Act of 1976, Pub. L. No. 94-280, § 208(b), 90 Stat. 425, 454-55 (codified at 23 U.S.C. § 402 note (1976)) (prohibiting the Secretary of Transportation from enforcing any uniform safety standards which he promulgates until he conducts an evaluation of their adequacy and appropriateness and reports his findings to Congress); Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 202(b), 90 Stat. 31, 35 (codified at 49 U.S.C. § 1(5) (1976)) (requiring the Interstate Commerce Commission to solicit and consider the recommendations of the Attorney General and the Federal Trade Commission in establishing rules to determine "market dominance").

¹²² See, e.g., Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 5(b), 89 Stat. 773, 794 (codified at 20 U.S.C. § 1411 note (1976)) (the Commissioner of Education must submit for review and comment any proposed regulations concerning the classification of children with special learning disabilities to Congress at least fifteen days before their publication in the Federal Register); Foreign Relations Authorization Act, Fiscal Year 1976, Pub. L. No. 94-141, § 406, 89 Stat. 756, 770-71 (1975) (codified at 22 U.S.C. § 2666 (1976)) (regulations by the Secretary of State authorizing security officers to carry firearms must be transmitted to Congress twenty days before the date on which such regulations take effect); Air Transportation Security Act of 1974, Pub. L. No. 93-366, § 315(a), 88 Stat. 409, 415 (codified at 49 U.S.C. § 1356(a) (1976)) (the Administrator of the Federal Aviation Administration, unless he determines that an emergency exists, must notify Congress of any changes in passenger screening regulations at least thirty days before such changes become effective).

and General Accounting Office examinations. Congress also could establish select committees and specialized subcommittees to oversee agency rulemaking and enforcement. Committee reports, especially those reports accompanying authorizations and appropriations, may be used to advocate agency reconsideration of particular rules and their implementation. Congressmen could issue floor statements critical of specific rules or agency enforcement procedures. All of these devices, however, increase congressional workload without directly controlling executive action. As a result, the control that these mechanisms provide is inefficient and often ineffective.

Another course that has been recommended as an alternative to the legislative veto is a Legislated Regulatory Calendar.¹²³ The proposed calendar would consist of the following elements:

1. Each year Congress would receive a list of planned major regulatory proposals . . . , together with preliminary analyses of projected costs and benefits, from the Executive Branch and independent agencies
2. New Regulatory Authorization committees in the House and Senate . . . would consider the list, modify it as necessary, and then send it to the floor
3. The full Congress would be required to approve the Calendar before the agencies could proceed with their rulemakings ¹²⁴

The legislated calendar approach would require the establishment of regulatory authorization committees in the House and Senate. Each committee would consider the list of proposed regulations, modify it as necessary, and send the list with its recommendations to the floor for approval. This process would consume a tremendous amount of Congress's time and resources. Moreover, the Legislated Regulatory Calendar is an inflexible, indirect approach to legislative control of agencies.

Chadha also might revive interest in the Bumpers Amendment.¹²⁵ That bill would expand judicial review of agency action by removing any presumption in favor of agency action in determinations on questions of law and by imposing a more rigorous standard of judicial review for agency rulemakings.¹²⁶

¹²³ *Hearings*, *supra* note 89 (statement of Robert Litan, former Energy and Regulation Economist, President's Council of Economic Advisors).

¹²⁴ *Id.*

¹²⁵ The latest version of the Bumpers Amendment is S. 1766, 98th Cong., 1st Sess., 129 CONG. REC. S11,587 (daily ed. Aug. 4, 1983).

¹²⁶ *Id.*; cf. *Chadha*, 103 S. Ct. at 2796 n.11 (White, J., dissenting) (suggesting a limited role for a redefined legislative veto as a guide to interpretation of congressional intent);

While this proposal would result in closer judicial scrutiny of agency rulemaking to ensure conformity with congressional intent, it also may substantially delay the administrative process. In addition, the role contemplated for the judiciary under this proposal is not entirely appropriate.¹²⁷

For Congress, "the greatest difficulty that will be caused by the Supreme Court decision is a mushrooming of workload during a time when Congress is having difficulty coping as it is with its necessary legislative activities."¹²⁸ None of the alternatives suggested to date will enable Congress to review effectively executive proposals before they take effect. None permit a direct expression of congressional intent to control the exercise of delegated authority by the executive branch. Thus, the only effective response to the *Chadha* dilemma is the adoption of this amendment.

V. CONCLUSION

The Constitution of the United States has been in operation for nearly two hundred years. Although the Framers realized that the document was not perfect and provided means for its amendment, it has undergone surprisingly few changes. The Constitution has proven to be an enduring instrument. In the course of the growth of this nation, more than 6,900 constitutional amendments have been proposed, but only twenty-six have been adopted.¹²⁹

Hearings, *supra* note 89 (statement of Sen. Grassley (R-Iowa)) ("[Another option is] a proposal to attach a presumption of invalidity to an agency action that is challenged before the courts where that action has been the subject of congressional resolution of disapproval.").

¹²⁷ See R. Natter & M. Rosenberg, *Scope of Judicial Review of Agency Rulemaking: A Review and Assessment of Pending Congressional Proposals for Change*, Congressional Research Service Report (Aug. 24, 1982).

[S]ome question may be raised whether the role envisioned for the courts is appropriate. Under the proposed statutory scheme some argue, it is possible the courts will become enmeshed, willingly or otherwise, in substantive rationality review of informal rulemaking determinations. Such involvement carries the potential that the courts will engage in tasks that in administrative law have been considered both beyond their competence or legitimate sphere of concern.

Id. at 73.

¹²⁸ *Hearings*, *supra* note 89 (statement of Norman Ornstein, Professor of Politics, Catholic University).

¹²⁹ According to *Proposed Amendments to the Constitution of the United States Introduced in Congress from the 88th Congress, 1st Session Through the 90th Congress, 2nd Session*, S. Doc. No. 38, 91st Cong., 1st Sess. (1969), 6940 proposals to amend the

An amendment to the Constitution is never to be treated lightly. Nevertheless, the *Chadha* decision seriously weakens the government's ability to function as an accountable, harmonious whole. Therefore, even though amending the Constitution will take time, it is a necessary endeavor. As Hamilton stated, "'Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent WHOLE."¹³⁰

The *Chadha* case presents a situation that requires an amendment to the Constitution. The legislative veto "is an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress' control over lawmaking."¹³¹

The words of Justice White in his dissent in *Chadha* best describe the role of the legislative veto:

The prominence of the legislative veto mechanism in our contemporary political system and its importance to Congress can hardly be overstated. It has become a central means by which Congress secures the accountability of executive and independent agencies. Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its lawmaking function to the executive branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role.¹³²

As Thomas Jefferson predicted, the people "will see and amend the error in our Constitution, which makes any branch independent of the nation."¹³³ The *Chadha* decision establishes the administrative agencies of the government as an independent, unaccountable fourth branch. This amendment will correct that error.

Constitution had been offered as of the end of 1968. Since then, there has been no reduction in the number of proposals.

¹³⁰ THE FEDERALIST No. 82, at 553 (A. Hamilton) (J. Cooke ed. 1961) (emphasis original).

¹³¹ *Chadha*, 103 S. Ct. at 2795 (White, J., dissenting).

¹³² *Id.* at 2792-93 (White, J., dissenting).

¹³³ D. MALONE, JEFFERSON, THE PRESIDENT: SECOND TERM, 1805-1809, 304-05 (1974) (questioning the degree to which the Constitution insulates the judiciary).

Senator DECONCINI. I look forward to the hearings today, Mr. Chairman, and intend to stay here, although I am anxious to get back to the confirmation hearings of Mr. Meese.

I want to thank you again for allowing me to proceed yesterday. I did get about halfway through, thanks to your generosity.

At this time I want to compliment, of course, the Senator from Iowa, Mr. Grassley, who has been a leader in attempting to find alternatives to the *Chadha* decision. He has introduced legislation, as the Senator from Utah has pointed out, which I am also cosponsoring, and I would be glad to yield to the Senator from Iowa at this time before we start the panel.

**OPENING STATEMENT OF SENATOR CHARLES E. GRASSLEY,
A U.S. SENATOR FROM THE STATE OF IOWA**

Senator GRASSLEY. Thank you.

I think it is a very good thing that Senator Hatch has called this hearing to have discussion on the very important issue of what route we ought to take as a result of the *Chadha* decision, and of course, I appreciate Senator Hatch's remarks about my efforts in this direction, but more important, having a chairman of an important subcommittee like this as a cosponsor of my approach I appreciate very much, and I also want to thank for the same reason, as well as acknowledge his leadership, my friend Dennis DeConcini for these efforts as well.

Legislative veto has been with us for decades, and in recent years its usage, of course, has grown very dramatically. It is in direct response to the growth of Government regulations and their burdens upon our economy and our citizens.

Murray Weidenbaum, when he was Chairman of President Reagan's Council of Economic Advisors, said Federal regulations cost the U.S. economy at least \$100 billion, and I have even seen figures higher than that.

In an attempt to deal with the details left over following passage of enabling legislation, of course, Congress has delegated lawmaking power to independent executive branch agencies, and now apparent is the principal problem in the wake of the *Chadha* decision of Congress leaving itself no systematic mechanism by which we can oversee the legislative process of lawmaking as elected representatives of the people.

Now, of course, we must find a way to enable Congress to review proposed regulations and to block them if we consider them too burdensome, contrary to congressional intent, and costly.

The method proposed by Senator DeConcini is this constitutional amendment to provide for congressional review of agency regulations. Although it may not be accepted by everyone, it seems to me to be a very proper solution to a regulatory problem, at least the constitutional aspects of the regulatory problem we now have before us.

Arguments are heard that Congress is too busy to examine all rules promulgated by Federal agencies. I would like to respond to that by saying that if 535 Members of Congress, with its thousands of staff people, cannot take the time in its oversight capacity, and that is one that we always brag about exercising carefully, if we cannot do that, to examine what amounts to substantive obliga-

tions being placed upon the citizenry of this country, then something is terribly wrong, not only with the system, but with those of us that work within that system.

Is it fair to ask a small businessman to comply with a regulation which we claim we do not even have time to read?

I feel that congressional review of agency rules is a vital concept to our governing process, and will lead us toward the goal of more effective oversight of the administrative branch from within the Congress.

Clearly, as President Reagan said before he was President, because he said this in 1979, and I quote, "The legislative veto seems to be an idea which is gathering the momentum of a snowball rolling downhill," or at least I am saying this. It was until the Supreme Court melted that snowball on a hot day last June.

The support for the legislative veto is quite apparent. The reasons why it enjoys such support are clearer still, as Justice White stated so eloquently in that *Chadha* dissent. He said:

It has become a central means by which Congress secures accountability of executive and independent agencies. Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its law-making function to the executive branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role.

I think every Senator in the next 2 weeks, as we face on the floor of the Senate this decision of what route to take on legislative veto, ought to review what Justice White said in that dissent, because nothing could be more clearly stated, and nothing could be better used as a benchmark for each Member of Congress to judge himself or herself by what they want their role to be in the policymaking process.

I want to go on to say that the fact that the Supreme Court has handed down its opinion that veto is unconstitutional does not alter or dilute the original rationale which persuaded Congress to adopt and utilize the legislative veto in the first place. The crux of that issue is: who shall write the laws of the land, and who shall ultimately be responsible?

Of course, I think now we should move ahead with a meaningful, efficient, comprehensive review mechanism to regain effective control over the lawmaking authority we delegate to others. Such a move will strengthen, not weaken, the separation of powers.

In conclusion, I invite the Members of this body who have not already done so to join the Senator from Arizona in the cosponsorship of both the following amendments. The first one, this one, Joint Resolution 135, to amend the Constitution of the United States to reverse the *Chadha* decision by amending the Constitution and bringing this much-needed regulatory reform back to Congress.

Second, what is referred to as the Grassley-Heflin amendment to S. 1080, the Regulatory Reform Act. More specifically, it provides for joint resolutions of approval over major agency rules, and a joint resolution of disapproval over nonmajor agency rules.

I am pleased to say currently this proposal has 18 cosponsors which includes a majority of the Judiciary Committee, and I thank these gentlemen for their support of that, as well.

Senator DeConcini, again, I want to thank you and Senator Hatch, and I stand fully in support of this resolution that we are now discussing.

Senator HATCH. Thank you, Senator.

Senator DeCONCINI [presiding]. Senator Grassley, thank you. You certainly have been a leader in this area of legislative approaches to the veto problem. I think we may have an opportunity here soon to act on that, and I am going to join you, of course.

Our first panel this morning is the Honorable Abner Mikva, circuit judge of the U.S. Court of Appeals, distinguished jurist and former Member of Congress, and Professor Don Elliott, of the Yale Law School.

We are very pleased to have you here, gentlemen. Judge Mikva, thank you for taking the time to be here and continue to be involved in the legislative process. I know you are also currently involved not only in the judicial process, but also in the human rights area, recently being in England with one of my staff people at a very interesting conference. I compliment you for your tremendous activity in this area.

I would like to ask that the witnesses introduce themselves for the record and give a brief summary of their remarks. Their full testimony, if they have prepared statements, will be printed in the record.

Judge Mikva.

STATEMENTS OF A PANEL CONSISTING OF HON. ABNER J. MIKVA, U.S. COURT OF APPEALS, AND PROF. DONALD ELLIOTT, YALE LAW SCHOOL

Judge MIKVA. Thank you very much, Senator DeConcini. It is a distinct privilege to appear before this committee and before my former colleague in the House, Senator Grassley, and this distinguished committee.

Senator GRASSLEY. Judge, I'd like to take advantage of this opportunity to welcome you here, as well, and to tell you that I appreciated all of the years we served together. We may not have agreed often but I remember you as a dedicated public servant, and I read enough about you in the newspaper to know that you are continuing that tradition.

Judge MIKVA. You are very kind, and we surprised people sometimes, Senator, about how often we did agree.

Senator GRASSLEY. Yes.

Judge MIKVA. I hope I can surprise this committee equally again today.

I will summarize my statement by saying, as both of you know, that when you come from the distinguished body of the Congress, you never quite leave it. You can take the boy out of the Congress, but you cannot take the Congress out of the boy. Accordingly I understand and respect the need for the legislative veto, and I am here to extoll its virtues rather than to criticize its excesses, although I must say that I saw both while I was in the Congress.

I will not repeat my statement, but to talk about the excesses for a moment, if I can, I voted to override the decision of the administrative law judge in *Chadha*. I do not remember whether Senator Grassley was in the House then or not, and whether he voted that way, too. I went back and reread the Congressional Record and, Senator DeConcini, for the life of me, I cannot remember why I voted to override the decision in *Chadha*.

As I look back on it, this was not the exercise of a legislative judgment. Here we were taking issue with an administrative law judge who had made findings of fact about an individual and the application of a statute of the Congress to that individual. Those, it seems to me, are the kinds of decisions that Congress ought not get involved in reviewing on an individual basis.

If in your oversight capacities it turns out that the law does not work, then the law ought to be changed. But the decision as to Mr. Chadha was not something that the Congress could or should dedicate its attentions to, and as I say, I think my criticism of the legislative veto when I was in the Congress was that we were using it in too many places where it should not have been used.

Having said that, I think that the Supreme Court decision is unfortunate, and I can offer this criticism since I do not sit on legislative veto cases. Normally I do not criticize my nine bosses who sit across the street, but on this issue I have not been acting as a judge, since I was so outspoken about it when I was in Congress. I think that the Supreme Court overwrote *Chadha*. I think that they used their pen too broadly in trying to reach at the excesses and took away not only a necessary tool to the legislative process, but, indeed, wrote in a way that simply cannot be enforced. The main message I want to deliver today is that I think that the stated impotency of Congress post-*Chadha* is grossly exaggerated. I think that the Court restrained the form in which the Congress may exercise the legislative veto, but the Court did not and cannot get at the substance, not unless it strikes down all of article I as unconstitutional.

Let me address myself specifically to the constitutional amendment which is the subject matter of this hearing. I think that Senator DeConcini, as usual, has focused attention on the problem very well. The amendment is specific. It is brief. It is in the format that constitutional amendments ought to be, devoid of rhetoric and goes right to the heart of the problem.

My concern about it is that the constitutional amendment is the ultimate weapon that Congress and the country have to change the basic structure of government. As I say in my statement, we have only gone to the amendment well 16 times since the adoption of the constitution, for all practical purposes, and none of those 16 ever addressed the separation of powers or the allocation of powers between the three branches; I would hope that we do not have to do that even to get at the excesses of the *Chadha* decision.

I point out in my statement that there are many tools left to the Congress. First of all, as all of you know, Senator Grassley's and Senator Heflin's amendment to S. 1080, I think, is squarely within the constitutional bounds of article I. I think that the Court, no matter what was said in *Chadha*, simply could not argue with what the sponsors—and I understand you are also a sponsor, Sena-

tor DeConcini—what they propose to do there: both as to the fast track approach, which is what some people call the operational mechanism of the amendment, and as to the withdrawal from agencies of their rulemaking power, replacing it with a rule-recommendation power. This is clearly within the authority of Congress, and the Court could not and would not do anything about it if you chose to exercise such an authority.

I similarly point out that even short of that, the severability clause may be used to good affect. In addition to the distinguished dissent of Justice White, there was a short dissent by my former colleague and coclerk, Justice Rehnquist, in which he quarreled with the Court's decision that the legislative veto was severable from the rest of the statute; indeed, the majority used the fact that there was a severability clause in the statute itself to hold that they could strike down the legislative veto without striking down the rest of the statute.

Justice Rehnquist criticized that legislative interpretation. I merely point out that all you have to do is turn that too ready use of the severability clause into an inseverability clause, and say that the legislative veto shall be inseverable from the exercise of the power in the first place; then the Court and the executive branch are going to face a Hobson's choice of either foregoing the power in the first place or accepting the fact that there is a legislative veto that is connected with it.

Sometimes that would throw out the baby with the bath water, but sometimes, used judicially—for instance in *Chadha*, if in fact the Congress did not want to give up its ultimate control over the suspension of deportation—Congress could simply insert after legislative veto language a clause reading: "this legislative veto shall be inseverable from the authority granted to the agency." Then if the Court chooses to strike down the legislative veto, the agency power goes with it.

Now, the same thing can be done with the ingenious use of the appropriations power that the Congress obviously controls.

All of these alternatives, as is true anytime the Congress acts, can be excessive, can be dangerous, and can be mischievous; my last thought that I would like to leave the committee with is that I hope that the great policy debate that was ongoing when I was still a member of this distinguished Congress continues; that while *Chadha* may be the current matter of concern, that the Congress continue to recognize that there are policy questions as to when to use the legislative veto, and that it ought not be thrown in as an automatic device, regardless of the purpose, regardless of the kind of executive authority that is being exercised.

I would hope that while you look at the ways of repairing the battle damage from the *Chadha* decision, that you also recognize that the ultimate policy power of when to judiciously use that legislative veto is one that rests squarely in the first branch of Government.

I close simply by saying that I teach the legislative process at the University of Pennsylvania, and I just wrote a book on the American Congress, a textbook. I am convinced, to paraphrase Justice Black, who used to say that the first amendment was not first by accident, article I of the Constitution does not set up Congress as

the first branch of Government by accident. There may be equal branches, but some are more equal than others. I think the Congress can exercise its power more equally than the courts.

Senator DECONCINI. Judge Mikva, thank you.

Quite frankly, I am pleased with your statement because it lays the foundation here of the relationship between Congress and the executive branch. I think you very astutely point out the kind of frustration that we go through here and how we do occasionally overuse some of those tools. I also believe the *Chadha* decision, certainly in the Court's interpretation, was going too far.

I appreciate that testimony, and your full statement will be printed in the record as if read.

[The material referred to follows:]

PREPARED STATEMENT OF HON. ABNER J. MIKVA

In my nearly five years on the bench, I have become an even greater admirer of the efficiency of the U.S. Constitution and the system of powers established under it. Among other reasons, the Constitution is the best model ever devised for brevity, for avoidance of redundancy and for efficacious use of language. In part because it deals with grand concepts of government, rather than the specific details of government operation, it has allowed us the necessary flexibility to thrive and grow for almost 200 years. Only 16 Amendments have been necessary to adjust the basic document of governance since the founders dealt with it. And of those 16 Amendments, none has effected any substantive changes in the allocation of power between the three federal branches of government. I start out therefore with some bias against the notion of changing the Constitution to accomplish such a result.

Having stated my bias, let me talk specifically about S.J. Res. 135, as proposed by Senator De Concini. It too is a model of brevity, and I think it would accomplish its stated aim -- it would wipe out any vestige of Chadha v. INS and would remove almost every impediment from Congress retaining an approval right over executive action authorized by the Congress. If that sounds mealy-mouthed, let me state the exceptions to such an effect. S.J. Res. 135 clearly would not allow the Congress to reserve or claim any power to approve executive action stemming from use of the inherent executive powers provided in the Constitution. The President is the Commander-in-Chief under § 2 of Article II of the Constitution, and Congress could not interpose any reservation of a right to approve action taken by the President as Commander-in-Chief with or without the passage of S.J. Res. 135. I am sure that is as the sponsors intended.

Similarly, Congress could not reserve an "approval" power over the President's delivery of the State of the Union address, or his power to prorogue the Congress in case of their disagreement over adjournment. Perhaps less intentional, Congress would not be able to delegate its power to one of its committees, since the language speaks of "approval of one or both Houses." This would leave invalid some of the specific and some of the informal uses of the legislative veto which have been exercised by Congress through a committee of the Congress.

My greatest concern is whether the ultimate weapon of a constitutional change is necessary to cause a retrenchment of the apparent scope of the Supreme Court's opinion in Chadha. Again, I ought to state my biases. Since I had so freely expressed myself on this issue while still in Congress, I have not sat and will not sit on any of the cases involving the legislative veto issue. So I claim that I have retained my right to express my views. First, I think that Congress did make excessive and unconstitutional use of the legislative veto in the rash of laws passed in the last 15 years. Second, I think the Supreme Court wrote with an overly broad pen in Chadha, depriving Congress of more authority than was warranted. But the sweeping language of Chadha does not justify engraving an equally sweeping and fundamental change in the system of government that has served us so well so long. I believe that Congress can reclaim much of its lost turf without a constitutional amendment.

The post-Chadha impotency of Congress in this arena is grossly exaggerated. You will recall that in Chadha, the Court found the legislative veto constitutionally invalid. The Court went on to find that the legislative veto clause was severable from the grant of authority to the Immigration and Naturalization Service to suspend deportation in the first place. Suppose Congress had specifically said that the clause

was inseverable from the grant of authority. The result sought in Chadha specifically -- denial of the suspension of deportation -- would have been achieved.

In many cases, this will indeed throw out the baby and the bathwater, but there are so many variations on this theme -- particularly by creative use of the appropriations powers of Congress -- that I think courts will be hard-pressed to uphold a full application of Chadha.

There are other non-constitutional remedies being discussed. My colleague, Judge Stephen Breyer, who formerly toiled so ably in this committee's vineyards, has suggested a "fast-track" procedure, whereby Congress would "confirm" the exercise of executive action in a routine "fast-track" confirmatory action that would in fact be a legislative enactment presented to the President. If Congress chose not to confirm such executive action, i.e. "veto" the action, there would be a derailment from the fast-track by either House, and the "veto" (or "non-confirmation") would be effected.

Professor Larry Tribe has suggested all of the above alternatives as well as analogies to federal rules procedures, which he calls a "report and wait" mechanism. S. 1650 would codify the "report and wait" procedure as to all significant agency rules, and utilize the "fast-track" approach to oversight such rules. The proposed amendment to S. 1080 by Senator Grassley and Senator Heflin would also pursue that approach.

Whatever the alternatives that Congress devises, I hope that the great policy debate that was ongoing when I left the most powerful branch of government is not put aside -- simply to joust with the Chadha case. There were excesses to the use of the legislative veto -- as a matter of policy and wisdom, if not as a matter of the Constitution. I voted to override the INS in the Chadha matter, and for the life of me I cannot tell you why -- even after I reread the Congressional Record for the

day on which the House of Representatives "vetoed" a quasi-judicial decision by an Administrative Law Judge who first decided, on a factual basis, that Mr. Chadha should not be deported under the applicable legal standards. Congressional intervention in that kind of proceeding is exactly the kind of legislative veto that should not be sought nor used, whether constitutionally available or not. Indeed, it "looks like" Congress seeking to overturn a judicial decision, not as a precedent, not as a decision of legislative policy for the future, but as a retroactive, ex-post-facto judgment about an individual's rights under the law. Whether constitutionally permissible or not, those are the excesses to the legislative veto which Congress should avoid. One might have wished that the Court had limited its decision to such a narrower scope. One can hope that such a narrowing may yet occur.

I would hope that whether by statute or by Constitution, the Congress would act less precipitously and less sweepingly than the example that was set for you by my branch of government. Maybe there should be individual "report and wait" and "fast-track" approaches for some agencies and some rules. Maybe some concerns can be accommodated through judicious use of the severability clauses, or of the appropriations power. In any event, the fabric of administrative government and administrative law is so complex and sensitive to big changes, that I hope the Congress acts deliberately. The ultimate power is yours, and the policy judgments are yours to make. But there is an incredible amount of government necessarily and properly performed by executive agencies. The remedial measures that Congress takes can have a tremendous impact on how we all perform. The options that Congress has available to remedy the excessive sweep of Chadha are numerous. The Constitution does not list Congress as the first branch of government by accident. I hope you exercise your options selectively.

Senator DeCONCINI. Professor Elliott, we will hear from you and then we will entertain some questions, if you would be so kind.

STATEMENT OF PROF. DONALD ELLIOTT

Professor ELLIOTT. Thank you, Mr. Chairman. I will not repeat my full statement here.

Senator DeCONCINI. Without objection, that will appear in the record.

Professor ELLIOTT. I agree with essentially everything that Judge Mikva has had to say. So I will try to make a few additional points and concentrate on what I think may be one area of disagreement.

I, like Judge Mikva, think that the *Chadha* decision was mechanical and unenlightened. I think that with the rise of generic rule-making in the 1970's, the center of gravity of lawmaking has shifted away from the Congress and into the agencies.

However, I think that some proponents of the legislative veto leap from the rise of administrative lawmaking to the legislative veto as a solution without really being clear about what the problem is that they are attempting to solve.

It seems to me, as it did to Judge Mikva, that there are some instances which are appropriate for legislative vetos and others which may not be. I take it that this position is essentially consistent with Senator DeConcini's proposed constitutional amendment in that the amendment would not actually establish the legislative veto in any particular area of law, but it would simply make the device available for consideration on a statute-by-statute basis.

Let me turn to the text of Senator DeConcini's proposed amendment for a moment. I believe that the reference in the proposed text to "executive action under legislatively delegated authority" is unfortunate and probably should be changed.

The notion that lawmaking by administrative bodies is a delegation of legislative authority to the executive seems to me to be a legal fiction, which has been used to justify the creation of what amounts to a fourth branch of Government without a constitutional amendment. Many administrative decisionmakers are substantially independent of Presidential control, and it seems to me it is a fundamental misconception to treat them as part of the executive branch.

Since the 1930's many scholars have advocated that we recognize the administrative branch as a distinctive type of governmental power, and I think this type of an amendment to the Constitution would be a good place to do that.

In addition, I think the reference to "legislatively delegated authority" is undesirable for a second practical reason as well. One of the useful features of the legislative veto is that it permits Congress and the executive to share power in particular areas without getting involved in unproductive and essentially academic debates over whether the power is "executive" or "legislative" in origin. This was one of the ways in which the legislative veto proved particularly useful in the impoundment and war powers areas.

I think that the proposed amendment as presently written would require a determination by the Supreme Court that a power was either legislative or executive as a precondition for whether or not

you could create a legislative veto. I have suggested some language which has been included in the proposed alternative text as a way of essentially solving that problem.¹

Now, a place where I think I may disagree with Judge Mikva, and I think I probably do disagree with the Honorable Senator Grassley, is the question of whether or not a constitutional amendment is really necessary in this area. It seems to me that the Supreme Court went out of its way to write a broad opinion in *Chadha*, I suppose the place that I may differ with Judge Mikva is the question of predicting whether or not they really mean to stick by it.

He may be right. They may very well change their mind, but simply going based on what they said—and it seems to me that they chose their words in *Chadha* pretty carefully—the key operative passage is the Court's statement that action by Congress must be presented to the President for his veto if it "was action that had the purpose and effect of altering the legal rights, duties and relations of persons outside the legislative branch."

The proposals that I have seen for reinstating the legislative veto, including Senator Grassley's amendment as I read it, seem to me to come within the scope of that language within the Supreme Court's opinion. The reason for this is that they are not simple "report and wait" provisions, as I understand them, but rather, under these proposed statutes, congressional action which is not presented to the President for his veto would alter the legal rights of persons outside the legislative branch. In my view, when the Congress passes a joint resolution of approval, that would have a legal effect on persons outside the legislative branch, which is what the Court has said would be unconstitutional in *Chadha*.

Again, we cannot know whether or not the Court might back off from that statement.

Finally, in the last part of my prepared statement, I discuss a possible alternative statutory approach which I think might be constitutional. That is to follow an approach that many States have followed of creating a separate body, which I call an administrative review commission, that would have the power to suspend administrative rules.

It seems to me that what we are talking about here is really applying the essential separation of powers logic of the Constitution to the rise of administrative lawmaking. We need some institution to act as a check on administrative lawmaking, but it does not necessarily follow that the Congress is the only, or even necessarily the best, way to go about doing that.

I think that it is important to recognize that the sections of the Constitution that the Supreme Court relied on in *Chadha* only apply to Congress itself. They would not necessarily apply to an instrumentality that Congress might create by statute.

Now, I admit that something like an administrative review commission is not an exact substitute for the legislative veto. It seems to me, and this may also be something of a difference between

¹ Professor Elliott's proposed text was: "Executive and administrative lawmaking may be subject to the approval of one or both Houses, without presentment to the President, if the legislation authorizing the lawmaking so provides."

Judge Mikva and myself, that the legislative veto is important because it enhances congressional power not only when it is actually invoked, but also simply because it exists. Administrative officials may be more forthcoming in reaching compromises in discussions with congressional committees if they know the committee is backed by a legislative veto.

This feature of the legislative veto is quite difficult to duplicate through a statutory solution without running afoul of *Chadha*. I think it might be possible to do so, however, by making all major rules subject to review by the administrative review commission, unless they were exempted from review by action of a relevant congressional committee or House. It seems to me that exempting an administrative rule from further review by a body other than Congress would not violate the *Chadha* decision in that that action would not in itself alter the legal rights of any parties outside the legislative branch.

So what I am essentially proposing is, one, a somewhat conceptual change in language in Senator DeConcini's amendment, and then a proposal that you consider this potential statutory approach as an alternative.

Thank you. I would be glad to answer any questions.

[The following was received for the record:]

PREPARED STATEMENT OF PROF. E. DONALD ELLIOTT

Mr. Chairman and Members of this Honorable Committee:

I appreciate the Committee's invitation to discuss Senator De Concini's proposed Constitutional amendment re-establishing the legislative veto.

Our Constitution serves two quite different functions. On one hand, the Constitution is the symbol of our country and its traditions. It is the Constitution, not King and country, that we swear to defend against all enemies foreign and domestic. The Constitution also serves the quite different function of establishing institutions of government and defining basic power relationships among them. The two functions of the Constitution are often inconsistent. Because we revere the Constitution as symbol, we may lose sight of the fact that we are trying to adapt an 18th century structure of government to 20th century problems. Occasionally an issue such as the legislative veto allows us to go beyond reverence for the Constitution as symbol and to think critically about our actual structure of government and how it might be improved. Such issues are, it seems to me, valuable historic opportunities to continue the process of Constitutional politics which the Framers only began.

My views about the legislative veto and the Chadha decision are stated in a forthcoming article in The Supreme Court Review.¹ I argue that the Supreme Court's decision in INS v. Chadha declaring the legislative veto unconstitutional across the board was mechanical and unenlightened. It seems to me, as it did to Justice White in dissent, that we face the unfinished task of adapting the essential vision of the Framers of the Constitution to accommodate the reality of an "Administrative state." With the rise of generic rulemaking during the 1970's, "the center of gravity" of law-making has shifted away from Congress and into the agencies.² As a result, the functions of

the other three branches of government and the relationships among them have changed.

Proponents of the legislative veto, however, often leap from the rise of administrative law-making to the legislative veto as a solution without being clear about the nature of the problems which they are trying to solve. Administrative law-making needs to be brought within the Constitutional system of checks and balances, but it does not follow that the legislative veto is the best available technique for checking administrative law-making in every context. I am in essential agreement with what I understand to be Professor Strauss's position: namely, that the legislative veto is a useful device in some contexts but not in others.³ I take it that this position is consistent with the approach of the proposed Constitutional amendment in that it would not actually establish the legislative veto in particular areas of law but would simply make the device available again for adoption on a statute by statute basis.

Turning to the text of proposed S.J. Res. 135 itself, I believe that the reference to "Executive action under legislatively delegated authority" is unfortunate and should be modified. The notion that law-making by administrative bodies is a delegation of legislative authority to the Executive is a legal fiction which has been used to justify the creation of a "Fourth Branch" of government without a constitutional amendment. Many administrative decisionmakers are substantially independent of Presidential control, and it is a fundamental misconception to treat them as part of the Executive branch. Since the 1930's, leading scholars have advocated that we recognize "the administrative branch" as a distinct type of governmental power.⁴

The reference to "legislatively delegated authority" is undesirable for a second reason as well. One of the useful features of the legislative veto is that it permits Congress and the Executive to share power over an area without getting

involved in unproductive, conceptual arguments over whether the power involved is "legislative" or "executive" in origin.⁵ For this reason, the legislative veto has proved useful in avoiding potential Constitutional crises over impoundments and war powers. However, the amendment as presently written would make a determination by the Supreme Court that a power was legislative in origin a pre-condition for the creation of a legislative veto.

To solve these problems, I would suggest that the Committee consider revising the text of the proposed amendment to read as follows: "Executive and administrative law-making may be subject to the approval of one or both Houses of Congress, without presentment to the President, if the legislation authorizing the law-making so provides."

A Constitutional amendment probably would be necessary to reinstate the legislative veto. The Supreme Court went out of its way to write a broad opinion in Chadha. The Court's operative test for action by Congress which must be presented to the President for his veto was "action that had the purpose and effect of altering the legal rights, duties and relations of persons ... outside the legislative branch."⁶ The proposals which I have seen for reinstating versions of the legislative veto by statute such as S.1080 and S.1630 seem to me to come within the scope of the Supreme Court's test. They are not simple "report and wait" provisions, but rather under these proposed statutes Congressional action which is not presented to the President for his veto would alter the legal rights of persons outside the legislative branch. Therefore, in my opinion these statutes would be unconstitutional and should not be enacted. Of course, it is always possible that the Supreme Court might change its mind, but I suspect that the words that the Court used in Chadha were chosen carefully.

If a statutory solution were possible, it would obviously be preferable to a Constitutional amendment for practical, political reasons. There is one possible statutory approach

which incorporates many of the best features of the legislative veto which I believe would be constitutional. Many states have "Administrative Review Commissions" which have the power to review rules promulgated by administrative agencies, and in some cases to suspend them.⁷ A similar body with the power to review and suspend, or even set aside, rules promulgated by administrative bodies could be created by statute at the federal level. The sections of the Constitution relied upon by the Supreme Court to strike down the legislative veto in Chadha apply to Congress itself, not to instrumentalities such as an Administrative Review Commission which Congress may create.

An Administrative Review Commission is not, admittedly, an exact substitute for the legislative veto. As a practical matter, the legislative veto enhances Congressional power not only when it is exercised, but also because it exists. Administrative officials may be more forthcoming in reaching compromises on policy matters with Congressional committees if they know that the committee is backed up by a legislative veto.⁸ It is more difficult to duplicate this feature of the legislative veto without running afoul of Chadha. It might be possible to do so, however, by making all major rules subject to review by the Administrative Review Commission unless they were exempted from review by action of the relevant Congressional committee (or House). Exempting an administrative rule from further review does not in itself alter legal rights or relations, and thus such a provision would be consistent with Chadha.

Thank you for giving me this opportunity to share my views with you on this important issue. I will be happy to attempt to answer any questions.

FOOTNOTES

- 1 Elliott, *INS v. Chadha: The Constitution, The Administrative Constitution, and the Legislative Veto*, 1984 SUP. CT. REV. 125.
- 2 See B. SCHWARTZ, *ADMINISTRATIVE LAW* 149-150 (2d ed. 1984).
- 3 See Strauss, *Was There A Baby In The Bathwater? A Comment On The Supreme Court's Legislative Veto Decision*, 1983 DUKE L. J. 789 (1983).
- 4 See J. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).
- 5 Cf. *INS v. Chadha*, 103 S.Ct. 2764, 2788 (1983).
- 6 *INS v. Chadha*, 103 S.Ct. 2764, 2784 (1983).
- 7 See Levinson, *Legislative and Executive Veto of Rules of Administrative Agencies*, 24 WM. & MARY L. REV. 79 (1982). See also NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *MODEL STATE ADMIN. PROCEDURE ACT*, Sec. 3-204(d) (rev. 1981).
- 8 See Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1409-12 (1977).

Senator DECONCINI. Thank you, Professor Elliott.

I will be glad to yield to the distinguished Senator from Iowa if he has any questions.

Senator GRASSLEY. Well, yes, I do have questions. Thank you very much.

Would you repeat for me what you said about independent agencies because I missed that?

Professor ELLIOTT. Well, I think it is a mistake that has really been perpetuated by the courts, but I think it is a mistake conceptually to think of independent agencies as part of the executive branch per se, because, as we all know, by statute agencies differ quite widely, and many of them are not realistically subject to control by the President, as such.

We have gotten into talking about delegations to the executive branch as a result of legal fictions that were used by the Supreme Court 50 years ago to uphold the process of administrative lawmaking, and I think if we are in the process of writing a constitutional amendment that addresses the question of administrative lawmaking, we ought not perpetuate that misleading legal fiction.

Senator GRASSLEY. Thank you. So your point is you would treat rules made by independent agencies different than executive agency rules?

Professor ELLIOTT. No. The language I suggested, which is the first alternative in this sheet that has been distributed, says "executive and administrative lawmaking may be subject to approval of one or both Houses." So I would treat them the same, but what I am trying to avoid, as a practical matter, is getting into what seems to me to be a very unproductive, academic debate about whether or not a particular rule is being made under the exercise of authority that has been delegated by the legislature.

It seems to me in a lot of these areas we would be better off just to say this is subject to the legislative veto rather than making a Supreme Court determination as to whether or not the original constitutional source of the power is "legislative." Not only would that give the Supreme Court enormous power to construe the amendment either broadly or narrowly, but it seems to me to perpetuate exactly the mechanical division of powers into legislative, executive and judicial which I understand Justice White to have criticized in his dissent, and I agree with that criticism. I just think that is not a very productive inquiry.

Senator GRASSLEY. I would like to make clear for the record that even though I am a cosponsor of this bill and it does solve everything, if there are routes other than this to take, I would prefer those routes, and I think that you are only proposing this amendment as a result of the *Chadha* decision. You were not doing this pre-*Chadha*, were you?

Senator DECONCINI. No, I did not.

Judge MIKVA. Senator Grassley, if I could just comment on what Professor Elliott says, I think that Senator DeConcini's language in the proposed constitutional amendment, while it could create some of the conundrums that Professor Elliott talks about, is necessary if you want to avoid an even more fundamental shift of power. As I understood you from your opening statement and the way I read the constitutional amendment, you are not proposing to try to chip away at the President's present, inherent constitutional powers as Commander in Chief; I am afraid that if you take out that limitation that you have in there—although it does create some ambiguity, I do not know how else you can make it clear—how you can make it clear that you are not intending some greater shift than you do intend.

Senator DECONCINI. If the Senator would yield. Just to pursue that, Judge Mikva, Professor Elliott indicates that the language that we ought to add there is "executive and administrative lawmaking."

Judge MIKVA. I thought I heard him to say in his statement that he would remove it altogether.

Senator DECONCINI. Isn't that correct, Professor?

Professor ELLIOTT. No, no. I perhaps should have read the text.

Judge MIKVA. I think you need a limitation.

Senator DECONCINI. That seems to go right to what you are saying, and I think it is a very good suggestion.

Professor ELLIOTT. The notion is that one would reach executive lawmaking, but would not reach the kinds of examples of inherent Presidential executive power which Senator DeConcini mentioned.

I think my language is really quite consistent with the functional approach that Senator DeConcini suggested in the sense that I simply use the term "lawmaking," which is a functional term, as opposed to this conceptual separation into executive, legislative, or—

Senator GRASSLEY. And I think that is the point you are making, isn't it, Judge?

Judge MIKVA. Yes.

Senator DECONCINI. That is a very good suggestion, and one that I think speaks for itself.

Excuse me. Go ahead.

Senator GRASSLEY. Well, as I was saying, I would really prefer some other method, and Judge Mikva suggests that he believes that Congress, and I am quoting from your statement, can reclaim much of its lost turf without a constitutional amendment, and we are going to try to be doing some of that in the various ways, and of course, one of those is a joint resolution of disapproval. It kind of gets almost to the ridiculous if you have to disapprove something by joint resolution, and it goes to the President, and he has to review the congressional reaction to something his administration proposes. Presumably the rule came to the Congress with his approval in the first place, particularly if it is an executive agency rule. He could then veto our disapproval resolution, and then we have to overturn his veto if we want to stick to our guns.

You eventually reach a point of having to have a two-thirds vote of the Congress to express disapproval of a regulation.

Now, the other approach, that of approval, is a different way. If one house or the other does not take action, of course, then that is effectively waylaying the rule even without the President's approval at that point, but only in that latter case do I think that the resolution is very effective, and in fact is not ridiculous.

I would ask, Judge, if you see every one of these proposals as regaining and reclaiming lost turf, or whether there are just some of them that do that in your judgment.

Judge MIKVA. I think they all do. I would urge the Congress to look a little more carefully at the severability clause.

You know, presently Congress puts in a severability clause almost mindlessly. It goes in the draft at the end of the statute sort of to signify that it is the end of the statute: whatever clauses are found to be unconstitutional or otherwise invalid shall be severable from the rest of the bill.

Well, if instead of mindlessly putting in severability clauses you would meaningfully and selectively put in inserverability clauses, it would make an important difference. Let me be very specific and take something I am familiar with: the controversy about airbags which raged in the Congress for many, many years.

Congress gave the general rulemaking power to NHTSA (the National Highway Traffic Safety Administration), and there was lots of fussing about whether NHTSA should or should not pass a rule mandating airbags; you will recall that controversy occurred in the Senate and in the House. Efforts were made to take away that power from NHTSA specifically by statute, but such the statute could not pass.

Suppose in the first instance, as a very severable, distinct grant of authority the Congress had said to NHTSA, NHTSA shall have the authority to make rules concerning the specific kinds of safety devices that shall be mandated by NHTSA and all such rules shall be subject to review by one house, two house, committee, whatever, and this clause is absolutely and positively inseverable from the rest of the statute

Now, I say with all deference to my nine bosses, they would at that point have to fish or cut bait. They would either have to say the whole rulemaking authority goes down or they accept the legislative veto.

I think judiciously used that inseverability clause can be a very effective turf reclamer.

Senator GRASSLEY. I have no more questions.

Senator DECONCINI. Fine. Mr. Benson of Senator Hatch's staff is here, and I would be glad to yield to him for any questions he may have in behalf of Senator Hatch.

Mr. BENSON. Thank you. I have just one question of Professor Elliott.

Professor Elliott, I wonder if you could explain a little more what your reasoning is when you say that you see some unconstitutionality with respect to Senator Grassley's proposed amendment to S. 1080.

Professor ELLIOTT. Certainly. I do not have any crystal balls to predict what the Supreme Court is going to do. I can only go by what they say, which, as we all know, is not necessarily a good guide to what they will actually do.

But based on what they say, and I think in *Chadha* after it was reargued and considered so carefully by the Court, that probably the language that they used was pretty carefully chosen. I do not agree with it, but in terms of what they said, they said—that it was unconstitutional for Congress to do something without presenting it to the President for his veto if the something that Congress did would alter the legal rights of people outside the legislative branch.

Now, it seems to me that a joint resolution of approval which puts into effect a rule alters the legal rights of people outside the legislative branch. Consider the air bag case, as an example. If you took the air bag rule and by statute made it a proposal and then when Congress passes a joint resolution of approval, it goes from a proposal to a legally binding rule. That, it seems to me, changes the legal rights of people outside the legislative branch.

I think, with all due respect, that Judge Mikva is saying, "I cannot believe they really meant that," and I am just saying, well, they may not have meant it, but they sure said it.

Judge MIKVA. I am not even saying that on that particular example, but there are other variations within the statutory approach that would be. For instance, the fast-track approach that is in there, I find it paradoxical, for example that the rules of evidence are exactly on that kind of an arrangement.

The Supreme Court under the statute proposes rules, and they come to the Congress; the Congress has the authority by either House to disapprove any of those rules within a certain period of time. If they do not disapprove them, the rules are valid and have the force of law. Now, I am just waiting to see what the Supreme Court says about that rulemaking power in light of *Chadha*.

Mr. BENSON. Just as a followup on that, as I understand Senator Grassley's proposal, and I may not, the joint resolution of approval or disapproval requires presentment to the President. Now, are you considering that in your response?

Professor ELLIOTT. No, I am misinformed. In that case. I do not see a problem. That is the equivalent of a statute.

Senator GRASSLEY. Yes. You interpreted it right, and I am sorry I did not make that clear.

Professor ELLIOTT. Well, I am sorry I misunderstood.

Mr. BENSON. Now, does that get rid of your problem of unconstitutionality?

Professor ELLIOTT. It does, indeed.

Mr. BENSON. Completely?

Professor ELLIOTT. Sure, because then a joint resolution of approval is, for constitutional purposes, the same as a statute. I do not think the Constitution cares whether or not the legislative branch, as a matter of its internal processes, makes it undebatable or unamendable or whatever else you do. That is a matter of your internal rules. I think all the Constitution cares about is presentment to the President.

If you intend presentment to the President, then I think there really is not any constitutional problem.

Senator DECONCINI. Then, following that just a little bit further, the only other area of concern you have expressed here with regard to S. 1080 is the fact that we are taking all governmental agencies, those that are solely executive and those that are not, and putting them into this process. Is that correct?

Professor ELLIOTT. Yes.

Senator DECONCINI. That is one of my concerns. Although I support the Senator's 1080 effort, that does trouble me and I do not know quite how to get around it. I talked with the Senator about it, and he also has struggled with it. It is kind of a difficult situation to be totally satisfied that you are doing it the best way.

Professor ELLIOTT. Well, let me comment on that, Senator DeConcini. I certainly agree with you. That seems to me to be not a constitutional question but a policy one.

Senator DECONCINI. A policy question, exactly.

Professor ELLIOTT. As a policy one, I would be strongly opposed to making all rules of all agencies, across the waterfront, subject to the legislative veto process. I think that that is something that really would get us into unchartered territory, and I think it would be undesirable.

I think that Congress would have to deal with really the interested—

Senator DECONCINI. Excuse me, Professor Elliott. If I am not mistaken, Senator Grassley—

Professor ELLIOTT. Surely.

Senator DECONCINI [continuing]. Yours has some financial limit, does it not?

Senator GRASSLEY. Yes. We would have joint resolution of disapproval for what we call nonmajor rules; the significant difference between major and nonmajor is a \$100 million economic impact.

Senator DECONCINI. It is economic impact, so that does rule out a lot.

Professor ELLIOTT. I was aware of that, and I think it does, but whether you are proceeding by approval or disapproval, if you do that for every rule, major rules and minor rules in a different way, I think one of the problems you are going to face is that the merits of a lot of these administrative rules are essentially going to be litigated in front of the Congress by the groups that are affected by them one way or the other, and I think that is undesirable for a number of reasons, but one of them that I have discussed in the

article¹ that I have written about the legislative veto is that none of the procedures that we have built up over the years and the procedural guarantees that have been built up over the years for the administrative process and judicial review, and so on, apply to that kind of congressional arena.

I think one thing that you might be able to do that would really preserve the essence of both proposals is to pass a statute that does essentially what Senator DeConcini has proposed, that is, to create this kind of framework for joint resolutions and so on, but then only bring it into effect on an individual statute-by-statute basis. That is something that we sometimes call the framework statute in the literature, and one could pass a statute but not in that statute automatically make it applicable to every single rule. You could decide that as you consider the individual rule, statute in question.

Senator GRASSLEY. Let me see if I can ask if there might be a misunderstanding, and I refer to your recent use of the word "litigate" as the litigation might be going on within the Congress.

We do not intend to affect litigation. We make very clear in our legislation that Congress' enactment, or lack of enactment, of the rules would not in any way affect the Court's review of it. Some of what might go on in the courts could go on in the Congress, but in regard to that, I think it is very basic to our system of government, participatory democracy, that there must be a forum for the contesting of legitimate differences of opinion within the economic forces of our Nation.

The ideal place to do that on legislation, not on judicial matters, is the Congress of the United States. It does not exist generally. It has existed to some extent pre-*Chadha*, and now effectively does not exist at all. The regulating process as it presently exists is simply not as effective in the resolution of differences as is the legislative process.

Senator DECONCINI. Gentlemen, thank you very much. You have been very helpful. We appreciate your testimony and those suggestions.

Our next panel is Prof. Peter Strauss from Columbia Law School, Mr. Stan Brand, former general counsel to the Clerk of the House of Representatives, and Cornelius Kennedy, former counsel to the Senate.

Gentlemen, if you would please identify yourselves for the record and summarize your testimony, your full statements will be inserted in the record.

Senator GRASSLEY. We have had Mr. Kennedy and Mr. Brand testify before our committee over the last 2 or 3 years on this subject many times, and I appreciate their being back again and want to acknowledge their contribution to the debate.

¹ Elliott, *INS v. Chadha: The Constitution, The Administrative Constitution, and Legislative Veto*, 1983 Supreme Ct. Rev. 125, 153-54.

STATEMENTS OF A PANEL CONSISTING OF PROF. PETER L. STRAUSS, COLUMBIA LAW SCHOOL; STANLEY M. BRAND, FORMER GENERAL COUNSEL TO THE CLERK OF THE HOUSE OF REPRESENTATIVES; AND CORNELIUS B. KENNEDY, FORMER COUNSEL TO THE SENATE

Professor STRAUSS. Senator, I am Peter Strauss, and on the assumption that you want us to go in the order in which you listed us, shall I begin?

Senator DeCONCINI. That will be fine.

Professor STRAUSS. Thank you.

I am sorry that I was not able to get my testimony to you ahead of time and that it addresses only the subject of Senator DeConcini's amendment. Through problems with the mails and others, that was, in fact, all I was able to come into possession of before coming here, and I did not then have the time to get my prepared testimony to you. You have it now.

I want to try and move on, given what I have heard in your discussion with Professor Elliott and Judge Mikva. I would agree with much of it. So let me take briefly from my prepared testimony what I think is relevant here, and then let's go from that.

I am a professor of law at Columbia University Law School. I specialize in administrative and constitutional law and have a background that includes some time in the Solicitor General's Office and a period as general counsel to one of the independent regulatory commissions Professor Elliott referred to, the Nuclear Regulatory Commission.

This fall I published in the Duke Law Journal a commentary on the Supreme Court's decision in *Chadha* and the other legislative veto decisions. I would be happy to provide it for your record. The commentary was highly critical of the reasoning of those decisions, although not of the results they reached.

The basic argument I made was that the Court should have been prepared to distinguish among various kinds of legislative vetos on the basis of their political settings and consequences.

I think the legislative veto is, in fact, a very useful device when the President and the Congress are dealing face to face, each with substantial political authority, over the matter at issue. I would include in that most of the settings in which the legislative veto was first used: Reorganization Acts, issues involving foreign relations and defense, Federal Pay Acts, and the interstitial adjustment of appropriations.

All these matters affect direct and continuing political, Presidential, and congressional relations. In these contexts, the use of the veto enhances the flexibility of government without, it seems to me, giving significant advantage to either of the two great political branches of our Government.

Judge Mikva used essentially this reasoning a couple of years ago in a short opinion in which he urged his brethren on the D.C. Circuit to give more thoughtful consideration to a challenge made before that court to an appropriations statute which had authorized the committee to approve, or for that matter to reject, executive department requests for variances in a line item budget.

On the other hand, I oppose the legislative veto in the regulatory context and think that the Supreme Court reached the right result in that context, that is, for the regulatory cases it considered.

Senator GRASSLEY. You put the specific facts of the *Chadha* case in that category you were just talking about, or does that fit into a quasi-judicial category?

Professor STRAUSS. Well, I would include the quasi-judicial category in the category of regulatory matters. That is, this is an issue which is not handled in a political context, but in the context of proceedings conducted in accordance with more or less formal procedures, with a public outcome expected, and in which individual interests are directly involved. So, yes, I do.

I think the committee is to be praised for considering the matter in the context of a constitutional amendment for I do think that that is what is required to overrule the Court, although I would tend to agree that some of the legislative responses that have been suggested, such as yours, Senator Grassley, might meet constitutional tests.

Although I think the constitutional route is the more straightforward one, I would oppose, and rather strongly, an amendment that sought to give Congress legislative veto authority while withholding similar authority from the President. It is at this point that I want to disagree somewhat with Professor Elliott's testimony. I cannot agree with him that the independent regulatory commissions are outside what might be loosely described as the executive branch of government, or, to put it in another way, are outside some conception of a political relationship with the President and the President's constitutional obligation to see to the faithful execution of all of the laws.

I do think Congress has, and has exercised, a very broad and sweeping authority over the definition of that relationship. In another article shortly to appear in the *Columbia Law Review*—which I can also make available for your record, if you like—I suggest that the character of that congressional authority is one that is conditioned on observation of a kind of parity between Congress and the President. That is to say, when Congress creates an independent regulatory commission, removed from Presidential control, it typically also removes that independent regulatory commission from its own political control. That seems to me just right. The problem I have with the amendment that has been proposed here is that it would pull the President away, while at the same time asserting a very large and forceful measure of political control by the Congress. In that way, it seems to me, it would fundamentally distort the framework, the current framework, of our constitution, in ways that I find objectionable.

Basically then the argument is that the proposed amendment would destroy the balance of political authority between the President and Congress, and is inconsistent, therefore, with the most fundamental principles on which our Government is organized.

As you have recognized, Senator DeConcini, in the statement you made in support of your amendment, that balance is one that the framers created to protect all of us from the ill effects that could come from the concentration of excessive power in any one of the

three named heads of government: Congress, President, and the Supreme Court.

I think where you and I might disagree about this issue is that I see the authority given to what is sometimes described as the executive branch of Government as quite different from the authority given to the President. In fact, the executive branch is barely hinted at in the Constitution. The authority that is given in the Constitution is given to the President, and it is his control and his relationship that seems important to me to protect.

So for that reason you probably see this amendment as only a small adjustment in relationships. I see it as distorting first principles.

I think the most important choice about the Presidency in the Constitutional Convention of 1787 was that there should be only one Chief Executive, a unitary figure at the head of all executive activity and politically accountable for it. It was not simply that executive power was to be separated from legislative power, but that it was to be focused in one place, one politically accountable place—in someone who might, therefore, be able to stand up to Congress, just as Congress properly stands up to him, and keep it in check.

Madison wrote in the Federalist Papers that the essence of the framers' idea of checks and balances lay in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The framers expected the branches to battle each other to acquire and defend power. To prevent the supremacy of one branch over any other in these battles, powers were mixed. Each branch was granted important power over the same area of activity.

The British and Confederation experiences had led the framers to avoid regarding controversy between the branches as a conflict between good and evil or right and wrong, requiring definitive, institutionally permanent resolution. Rather, they viewed this conflict as an expression of the aggressive and perverse part of human nature that demanded outlet, but had to be kept from finding lasting resolution so that liberty could be preserved.

The difficulty I have with your amendment, Senator DeConcini, is that it seems to me that it would create a lasting resolution. In so doing, it would deny the unity of executive authority, and thus destroy the capacity of the President to check Congress.

I think Professor Elliott's suggested changes to your amendment point out some of these difficulties. Virtually everything that the executive branch does it does under authority delegated by statute, and consequently, virtually everything that the executive branch does would come within the reach of your amendment as it is currently drafted, whether that is a decision to stage military exercises in Honduras, or to grant a government contract, or to issue a license to a trucker, or to prosecute a fraudulent manipulator of stocks.

Senator DECONCINI. If I may interrupt.

Professor STRAUSS. Yes, sure.

Senator DECONCINI. The suggestion that Professor Elliott made is to add the words "executive and administrative lawmaking." Would that change your views in the statement you just made?

Professor STRAUSS. That would certainly reduce the sweep of the change and alleviate my concerns. Yet, I still think that what you are doing in this limited area, which is still an area of governmental activity, is establishing a role for the Congress without permitting a similar political role for the President.

The President is not currently in a position—certainly with the independent regulatory commissions, and the argument is also made even for executive departments—to say to a body exercising rulemaking authority under a statute of this Congress, “You may not adopt that rule.” He is not in a position to say to that body, “You must adopt the following rule.”

Obviously if he could say such things, that would give him enormous political control. All that would have to happen would be that vague threats would be heard from the White House. “You know, if you do that, the President is not going to approve.”

Senator DECONCINI. I appreciate your point of view. My problem is that in reality what you are saying is just not what is happening. Congress gives great discretion now. It has been viewed by Congress, and I suspect the majority of the populous—at least those who are affected by it—that the regulatory agency through the executive branch has extended itself too far—far greater than what Congress intended.

Therefore, the political reality is how to curb that overextension without taking away the executive power from the executive. That is not what I want to do. Your argument is very well taken, except it is not the practical problem that we face today.

Professor STRAUSS. Let me just say a couple of words about one aspect of that practical problem. It seems to me that it is too easy to confuse the executive branch with the President. I want to focus our attention on the President.

As my articles develop in some detail, the point to keep in mind in assessing either the legislative veto or any like measure is its impact on the balance and tension between the Congress and the President. I want to emphasize that focus.

If a measure tends to enlarge the authority of the Congress at the expense of the President, or vice versa, it is for that reason objectionable. If you were to give the same authority to the President that you assert for yourselves over this vast agglomeration of authority that we loosely refer to as the executive branch, and which political scientists tend to refer to as the fourth or sometimes the fourth and fifth branches of government, then I would have no such objection.

If Congress were prepared to recognize the Presidential veto over governmental action in every case in which it claimed the same privilege for itself, different questions would be presented; in fact, I do not think we would choose quite so political an administrative process.

Senator GRASSLEY. Yes, you are talking about a different type of veto, too.

Professor STRAUSS. That is right.

Senator GRASSLEY. The Presidential veto versus the legislative veto. I mean there is a great distinction just as to the numbers and the ability to override.

Professor STRAUSS. Well, I think that one must recognize that the legislative veto process is also a highly political process. It is not simply a matter of the Congress ultimately passing a resolution, but of the conversations that take place back and forth before the resolution ever comes to the floor.

As long as only Congress has a voice, which is what your amendment would do, the necessary implication of the proposal is to fractionate the executive branch, is to undercut that fundamental decision that was made in 1787 that we would have only one Chief Executive and that that was necessary to oppose the enormous power being granted Congress.

Senator DECONCINI. Thank you, Mr. Strauss.

I did not mean to interrupt you with a question.

Professor STRAUSS. No, not at all. I appreciate it. Thank you.

[The following was received for the record:]

PREPARED STATEMENT OF PROF. PETER L. STRAUSS

I am a professor of law at Columbia University Law School, specializing in administrative and constitutional law; my background includes three years in the Solicitor General's Office arguing cases in the Supreme Court, and two years as General Counsel of an independent regulatory commission, the Nuclear Regulatory Commission. This fall, I published a commentary on the Supreme Court's legislative veto decisions in the *Duke Law Journal*¹, which I would be happy to provide for your record. I was highly critical of the reasoning of those decisions, but not of the results they reached. My argument was that the Court should have been prepared to distinguish among legislative vetoes on the basis of their political setting and consequences.

The legislative veto is a very useful device when the President and Congress are dealing face to face, each with substantial political authority over the matter at issue. Reorganization acts, federal pay acts, issues involving foreign relations and defense, and the interstitial adjustment of appropriations are all matters affecting direct, continuing, political presidential-congressional relations. Use of the veto in this context enhances the flexibility of government without, in my view, giving a significant advantage to either of the two great political branches of our government. Judge Mikva used essentially this reasoning in a short opinion urging his brethren on the DC Circuit to give more thoughtful consideration to a challenge to an appropriations statute that authorized the committee to approve (or reject) executive department requests for variances in a line item budget.² A panel of the court

1. Strauss, Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision, 1983 *Duke L.J.* 789.

2. *American Federation of Government Employees v. Pierce*, 697 F.2d 303, 308-309 (D.C.Cir. 1982).

rejected this device as "just another legislative veto," without considering the possibility of distinguishing between uses of the veto in political and regulatory contexts.

I think the Supreme Court reached the right result, however, for the regulatory cases it considered. While this committee is to be praised for considering the matter in the context of a constitutional amendment -- for that is what is required to overrule the Court -- I would strongly oppose an amendment that sought to give Congress legislative veto authority while withholding similar authority from the President. Since that is what the draft before you seems to do, I oppose it. Let me use the balance of my time to explain why. The argument I'm about to make is spelled out in much more detail in another article, soon to be published in the Columbia Law Review.³ I can also make a copy of that available for your record.

Basically, the argument is that this amendment is inconsistent with the most fundamental principles on which our government is organized, and would destroy the balance of political authority between President and Congress. That balance is one the Framers created to protect all of us from the ill effects that could come from the concentration of excessive power in any one of the three named heads of government -- Congress, President, and Supreme Court. Probably you see the amendment as only a small adjustment, but I would like to go back, however briefly, to first principles.

The most important choice made about the Presidency in the constitutional convention of 1787 was that there should be but one chief executive, a unitary figure at the head of all

3. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum.L.Rev. (April, 1984).

executive activity and politically accountable for it.⁴ It was not simply that executive power was to be separated from legislative power, but that it was to be focussed in one politically accountable place -- in someone who might therefore be able to stand up to Congress (just as Congress would be able to stand up to him) and keep it in check. As Madison wrote in the Federalist Papers, the essence of the Framers' idea of checks and balances lay in "giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."⁵ In the words of my former colleague Abraham Sofaer, now an outstanding District Court judge in the Southern District of New York:

"The Framers expected the branches to battle each other to acquire and to defend power. To prevent the supremacy of one branch over any other in these battles, powers were mixed; each branch was granted important power over the same area of activity. The British and Confederation experience had led the Framers to avoid regarding controversy between the branches as a conflict between good and evil or right

4. This first appeared in response to the arguments of Roger Sherman for making the executive subsidiary to the legislature, which "should be at liberty to appoint one or more [executive heads] as experience might dictate." 1 M. Farrand, Records Of The Federal Convention 65 (1911). His views were defeated, however, *id.*, as were all those who would have provided in the Constitution for the sharing of executive authority with a council of revision or a council of state -- and that despite the convention's concern that the President receive sound advice. 1 J. Elliot, Debates On The Federalist Constitution, at 159, 164, 214, 243, 257, 292; 1 M. FARRAND, *above*, at 93 - 102, 138 - 140; 2 *id.* at 73 - 80, 298, 367, 537 - 542.

5. The Federalist No. 51, at 349 (J. Madison) (J. Cooke ed. 1961). Madison conceded that Congress was better placed for this than the other branches; the choice of a two-part legislature was expected to generate an internal check within that body.

"This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner that each may be a check on the other -- that the private interest of every individual may be a sentinel over the public rights." *Id.* at 350.

and wrong, requiring definitive, institutionally permanent resolution. Rather, they viewed such conflict as an expression of the aggressive and perverse part of human nature that demanded outlet but had to be kept from finding lasting resolution so that liberty could be preserved."⁶

One may see the issue of balance of power among the three named branches of government as reflecting a process not an institution, with impermanence of resolution not only inevitable but desirable as an outcome. As former Attorney General Levi once wrote, the checks and balances idea creates "a tension among the branches, with each, at the margin, limiting the other, so that, in Madison's terms, "ambition [could] be made to counteract ambition."⁷

The difficulty I have with this amendment is that it would deny the unity of executive authority and, in so doing, destroy the capacity of the President to check Congress. The text of this amendment reads:

"Executive action under legislatively delegated authority may be subject to the approval of one or both houses of Congress without presentment to the President if the legislation that authorizes the executive action so provides."

Notice how this separates executive action from the President. Nothing now in our Constitution does that; to be sure, there are officers of government who are not the President, but they are all in some form of political relationship to him (as they are all in other forms of political relationship to you).⁸ The amendment would permit Congress to take all "executive action" away from the President and subject it to the approval of one or -----

6. A. Sofaer, War, Foreign Affairs, And Constitutional Power: The Origins 60 (1976).

7. Levi, Some Aspects of Separation of Powers, 76 Col. L. Rev. 371, 378 (1976) (quoting THE FEDERALIST NO. 51).

8. This includes the so-called independent regulatory commissions, as is developed at some length in my article on The Place of Agencies in Government; while evidently their relationship with the President is more remote than that of most agencies doing the work of law-administration, it is important to see that the reasons why Congress has done this make them equally remote from your own political oversight.

both houses of Congress. Although a limitation of the amendment to rulemaking would not change my view, I note that everything government does would be within the sweep of this language. The award of a defense contract is executive action, as is the decision to stage military exercises in Honduras, as is granting a license to a trucker, or deciding to prosecute a fraudulent manipulator of stocks. Each of these actions could be made contingent on approval by one or both houses of Congress with presidential participation (presentment) barred. This is not merely a limited response to an objectionable decision of our Supreme Court, but a fundamental reworking of the deepest principles of our government; it would put an end to checks and balances and would establish, once and for all, that Congress is supreme. While I can understand why some members of Congress might wish that, I hope you will understand why I feel citizens should oppose it.

Let me end on a more positive note. As my articles develop in detail, the point to keep in mind in assessing the legislative veto or any like measure is its impact on the balance and tension between Congress and President. If a measure tends to enlarge the powers of Congress at the expense of the President -- or vice versa -- it is for that reason objectionable. Where Congress shares political authority with the President, where each remains able to check the power of the other, the same objections cannot be made. That is why I think reorganization acts or budget adjustments, where the President participates, are so very different from the regulatory context, where in fact we have tended to exclude the President from participation. If Congress were prepared to recognize a presidential veto over governmental action in every case in which it claimed the privilege of voicing its own disapproval, different questions would be presented. In fact I do not think we would choose quite so political a regulatory world; but in such a world the salutary principle of checks and balances would not have been unstrung. Thank you.

COLUMBIA LAW REVIEW

VOL. 84

APRIL 1984

NO. 3

THE PLACE OF AGENCIES IN GOVERNMENT: SEPARATION OF POWERS AND THE FOURTH BRANCH

*Peter L. Strauss**

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For the past few years the Supreme Court has been struggling with issues of government structure so fundamental that they might have been thought textbook simple, yet with results that seem to imperil the everyday exercise of law-administration. Under what circumstances can Congress assign the adjudication of contested issues in the first instance to tribunals that are not article III courts? The past century has witnessed the profuse growth of legislation assigning to special adjudicative tribunals—administrative agencies and other article I courts—the power to hold trial-type hearings that might otherwise have been placed in the article III courts. Yet in a case challenging such an assignment in the context of the bankruptcy laws,¹ the Court could not summon a majority to agreement on an opinion. The plurality found the assignment unconstitutional employing reasoning that, despite its best efforts, appears to threaten most administrative adjudication and revive ghosts long thought quieted,² while the dissent opined in the face of intellectual difficulties with the governing language of the Constitution that it is "too late" to rely on the constitutional text.³

1. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

2. *Id.* at 76-82 (apparently reviving *Crowell v. Benson*, 285 U.S. 22 (1932)). For commentary on the significance of *Crowell*, see Schwartz, *Does the Ghost of Crowell v. Benson Still Walk?*, 98 U. Pa. L. Rev. 163 (1949); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 324-60 (2d ed. 1973) [hereinafter cited as *Hart & Wechsler*]; W. Gellhorn, C. Byse & P. Strauss, *Administrative Law: Cases and Comments* 277-96 (7th ed. 1979); L. Jaffe, *Judicial Control of Administrative Action* 87-94, 624-53 (1965).

3. *Northern Pipeline*, 458 U.S. at 113 (White, J., dissenting).

Can Congress empower bodies other than itself to adopt statute-like rules that acquire the force of law without either receiving bicameral passage in Congress itself or the possibility of presidential veto? Article II legislators—that is, executive rulemakers—have been acting at least since the turn of the century as if Congress could so empower them.⁴ Faced with challenges to congressional efforts to retain political controls over administrative rulemaking in the form of legislative veto provisions, the Court struck down the legislative veto in a formalistically reasoned opinion⁵ that struggled to avoid casting doubt on all rulemaking.⁶

What protection from litigious interference does the President have in his performance of office? The courts have recognized that congressmen, judges, and their aides require absolute privilege from civil liability for damage alleged to have resulted from their misperformance of office in order to protect their abilities to carry out certain functions.⁷ Yet the Court was barely able to find a similar privilege in the President personally,⁸ and only one justice would have extended it to his closest personal aides.⁹ The resulting isolation of the Presidency may be understandable given the outrageous conduct apparently involved in those lawsuits—the firing by the President of a whistle-blower¹⁰—but exposes the Presidency to external controls and corresponding risks of internal hesitation the courts have seemed quick to oppose for the other branches.

At the root of these problems lies a difficulty in understanding the relationships between the agencies that actually do the work of law-administration, whose existence is barely hinted at in the Constitution, and the three constitutionally named repositories of all governmental power—Congress, President, and Supreme Court.¹¹ When, for example, a federal agency adopts

4. See *United States v. Grimaud*, 220 U.S. 506 (1911).

5. *INS v. Chadha*, 103 S. Ct. 2764 (1983); see Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 Duke L. J. 789.

6. See 103 S. Ct. at 2785 n.16.

7. *Butz v. Economou*, 438 U.S. 478, 508–14 (1978); *Stump v. Sparkman*, 435 U.S. 349, 355–57 (1978); *Gravel v. United States*, 408 U.S. 606, 616–22 (1972).

8. *Nixon v. Fitzgerald*, 457 U.S. 731, 751–53 (1982).

9. *Harlow v. Fitzgerald*, 457 U.S. 800, 822–29 (1982) (Burger, C.J., dissenting).

10. But compare, as to the outrageousness of underlying conduct, *Stump v. Sparkman*, 435 U.S. 349 (1978) (judge authorizes sterilization of minor girl in pro forma “hearing” on unexplored petition of parent).

11. Note that this Article is concerned only with administrative as opposed to political action—that is, with settings productive of “agency action” in the Administrative Procedure Act sense, the end result of a body acting as an “authority of the Government of the United States” in some manner directly affecting members of the public. 5 U.S.C. § 551(1), (13) (1982); cf. *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971) (APA confers agency status on only administrative unit with substantial independent authority in the exercise of specific functions). We shall always be talking about governmental bodies in circumstances in which they are constrained to act under law enacted by Congress and subject to the possibility of judicial review. Government activities concerned with external relations and security are excluded from the inquiry.

a legislative "rule" following the procedures of the Administrative Procedure Act,¹² how is this act to be understood constitutionally? In a colloquial sense, the agency is acting legislatively—that is, creating general statements of positive law whose application to an indefinite class awaits future acts and proceedings. Validly adopted legislative rules are identical to statutes in their impact on all relevant legal actors—those subject to their constraints, those responsible for their administration, and judges or others who may have occasion to consider them in the course of their activities. Does it follow that in the constitutional sense what the agency is doing should be regarded as an exercise of the "legislative Powers . . . granted" by article I, "all" of which are vested in Congress? Or, given statutory authorization, is it to be regarded as an exercise of the executive authority vested in the President by article II, the judicial power placed in the Supreme Court (and statutorily created inferior courts) by article III,¹³ or authority merely statutory in provenance? The

This exclusion undoubtedly marks the largest part of executive authority as it might have been imagined by the political theorists on whom the drafters of the Constitution drew. Montesquieu, for example, describes as the "three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law." C. Montesquieu, *The Spirit Of The Laws* 151 (T. Nugent trans. 1949). The third, which he called "the judiciary power," *id.* para. 2, exists to punish criminals and determine individual disputes. It was best performed by courts and juries. That left public security and foreign affairs as the primary domain of the executive. A somewhat broader vision can be detected in the pages of the *Federalist* papers, see e.g., *The Federalist* Nos. 70–72 (A. Hamilton), but foreign and military affairs draw the bulk of attention.

This exclusion also sets off that aspect of governmental functioning that tends least to share the characteristics of legislative and judicial action, that tends least to be subjected to judicial (if not legislative) controls, and of which we are least likely to demand the characteristic and safeguarding attributes of those two forms of action, such as definitive, public statement of governing norms or reasoned, disinterested decision.

Thus, this Article addresses behavior that, in historical perspective, is not at the core of executive function. The distinction between political and administrative government had its counterpart in early writings about administrative procedure suggesting a distinction between "executive power" and "administrative power"—the first, concerned with those issues Chief Justice Marshall had identified in *Marbury v. Madison* as "[q]uestions . . . in their nature political," 5 U.S. (1 Cranch) 137, 170 (1803), the second, strictly statutory, and subject to presidential participation only to whatever extent might be provided by statute. See the elegant discussion of the writings of Freund, Wyman, Willoughby and Goodnow in Grundstein, *Presidential Power, Administration and Administrative Law*, 18 Geo. Wash. L. Rev. 285 (1950). One need not accept the proposition about complete congressional control of "administrative power" to find force in the distinction. The administration of regulatory schemes has qualities different from the conduct of foreign relations, warranting provision for a different albeit palpable degree of presidential (and for that matter congressional and/or judicial) involvement. Indeed, the central purpose of this essay is to examine the constraints that may exist on Congress's shaping of the administrative power.

12. 5 U.S.C. §§ 551(4), 553(c) (1982).

13. Federal courts have long been authorized by statute to adopt rules for the governance of proceedings before them, rules which have the force of law on those subject to them and those administering them, and in this respect questions parallel to those discussed in the text respecting agencies necessarily arise. See *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 15–16 (1825).

Constitution names and ascribes functions to only the Congress, President and Supreme Court, sitting in uneasy relation at the apex of the governmental structure; it leaves undiscussed what might be the necessary and permissible relationships of each of these three constitutional bodies to the agency making the rule. Is it significant for any of these purposes whether the rulemaking authority has been assigned to a cabinet department or to an independent regulatory commission? Indeed, does it make sense to look to the Constitution, written so many years ago, for contemporary guidance or limits on the sorts of arrangements Congress can make?¹⁴

Three differing approaches have been used in the effort to understand issues such as these. The first, "separation of powers," supposes that what government does can be characterized in terms of the kind of act performed—legislating, enforcing, and determining the particular application of law—and that for the safety of the citizenry from tyrannous government these three functions must be kept in distinct places. Congress legislates, and it only legislates; the President sees to the faithful execution of those laws and, in the domestic context at least, that is all he does; the courts decide specific cases of law-application, and that is their sole function. These three powers of government are kept radically separate, because if the same body exercised all three of them, or even two, it might no longer be possible to keep it within the constraints of law.

"Separation of functions" suggests a somewhat different idea, grounded more in considerations of individual fairness in particular proceedings than in the need for structural protection against tyrannical government generally. It admits that for agencies (as distinct from the constitutionally named heads of government) the same body often does exercise all three of the characteristic governmental powers, albeit in a web of other controls—judicial review and legislative and executive oversight. As these controls are thought to give reasonable assurance against systemic lawlessness, the separation-of-functions inquiry asks to what extent constitutional due process for the particular individual(s) who may be involved with an agency in a given proceeding

14. Cf. *supra* text accompanying note 3. The reader will probably divine without the help of this footnote with what suppositions I approach constitutional interpretation, yet it may be helpful to try to mark a spot for myself along the interpretivist-noninterpretivist continuum. My supposition is that the Constitution is law, binding judges (as it says it does) along with the rest of government. What was perhaps the framers' strongest proposition, that no part of government could be trusted free of the constraints of law, applies equally to the courts, even if they are the "least dangerous" among the branches. Danger may come, after all, not only from the harm one can accomplish directly, but from the disarray that can result from unsupported readings about the powers of others under a complex scheme that must be at once effective and safe.

That places me among the interpretivists, but within that field the reader will probably find me at least eclectic, if not undisciplined. I think it warranted to bring to the task of interpretation any information or skills a lawyer might properly use in understanding written text, and the idea of seeking contemporary rather than fixed meaning. The larger, underlying structural judgments of the document, see C. Black, *Structure and Relationship in Constitutional Law* (1969), have the greatest claim, in my view, to continuing adherence.

requires special measures to assure the objectivity or impartiality of that proceeding. The powers are not kept separate, at least in general, but certain procedural protections—for example, the requirement of an on-the-record hearing before an “impartial” trier—may be afforded.

“Checks and balances” is the third idea, one that to a degree bridges the gap between these two domains. Like separation of powers, it seeks to protect the citizens from the emergence of tyrannical government by establishing multiple heads of authority in government, which are then pitted one against another in a continuous struggle; the intent of that struggle is to deny to any one (or two) of them the capacity ever to consolidate all governmental authority in itself, while permitting the whole effectively to carry forward the work of government. Unlike separation of powers, however, the checks-and-balances idea does not suppose a radical division of government into three parts, with particular functions neatly parceled out among them. Rather, the focus is on relationships and interconnections, on maintaining the conditions in which the intended struggle at the apex may continue. From this perspective, as from the perspective of separation of functions, it is not important how powers below the apex are treated; the important question is whether the relationship of each of the three named actors of the Constitution to the exercise of those powers is such as to promise a continuation of their effective independence and interdependence.

In the pages following I argue that, for any consideration of the structure given law-administration below the very apex of the governmental structure, the rigid separation-of-powers compartmentalization of governmental functions should be abandoned in favor of analysis in terms of separation of functions and checks and balances. Almost fifty years of experience has accustomed lawyers and judges to accepting the independent regulatory commissions, in the metaphor, as a “headless ‘fourth branch’” of government.¹⁵ Although the resulting theoretical confusion has certainly been noticed,¹⁶ we accept the idea of potent actors in government joining judicial, legislative and executive functions, yet falling outside the constitutionally described schemata of three named branches embracing among them the entire allocated authority

15. The President's Comm. On Administrative Management, *Administrative Management in the Government of the United States* 30 (1937). They are, of course, not “headless”; all accounts of their functioning recognize that at least the courts and Congress remain superior—if not dominating—entities in their appropriate spheres.

16. See, e.g., Justice Jackson's dissenting statement in *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952):

[Administrative bodies such as the FTC] have become a veritable fourth branch of Government, which has deranged our three-branch legal theories . . . Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying “quasi” is implicit with confession that all recognized classifications have broken down, and “quasi” is a smooth cover which we draw over our confusion as we might use a counterpane to cover a disordered bed.

of government. What would be the consequences of so viewing all government regulators? I believe such a shift in view would carry with it significant analytical advantages by directing our focus away from the truly insignificant structural and procedural differences between the "independent regulatory commissions" and other agencies to the relationships existing between each such agency and the three named branches. Each such agency is to some extent "independent" of each of the named branches and to some extent in relationship with each. The continued achievement of the intended balance and interaction among the three named actors at the top of government, with each continuing to have effective responsibility for its unique core function, depends on the existence of relationships between each of these actors and each agency within which that function can find voice. A shorthand way of putting the argument is that we should stop pretending that all our government (as distinct from its highest levels) can be allocated into three neat parts. The theory of separation-of-powers breaks down when attempting to *locate* administrative and regulatory agencies within one of the three branches; its vitality, rather, is as the formulation and specification of those forms of control that may be exercised by Congress, the Supreme Court and the President over administration and regulation.

Bits and pieces of history contribute to our assumptions about the place of agencies in government—most notably, that there is a something called an "independent regulatory commission" that is somehow different in what it does from a cabinet department, and that need have no relation with the President though it is strongly associated with Congress and the courts. These bits and pieces have led us astray. The Department of Agriculture and the Securities and Exchange Commission both adopt rules, execute laws, and adjudicate cases, all pursuant to statutory authority. Why is that not the forbidden conjoining of powers? The question has been more obscured than answered, perhaps, by describing what the agencies do as "quasi-adjudication" or "quasi-legislation," as if the operations performed were in fact not the same three characteristic operations of government our eighteenth-century political theorists insisted must be kept separate for public protection. If the constitutional scheme were to require locating these agencies in one or another part of government, as more formalistic separation-of-powers opinions have sometimes hinted,¹⁷ which part would they be in? And how could they then be authorized to perform the functions associated with another part?

From the perspective suggested here, the important fact is that an agency is neither Congress nor President nor Court, but an inferior part of government. Each agency is subject to control relationships with some or all of the three constitutionally named branches, and those relationships give an assurance—functionally similar to that provided by the separation-of-powers notion for the constitutionally named bodies—that they will not pass out of control.¹⁸ Powerful and potentially arbitrary as they may be, the Secretary of

17. See *Id.*

18. For example, one may understand the delegation doctrine in this functional way, rather than as an indication "where" in government rulemaking occurs. That doctrine requires both

Agriculture and the Chairman of the SEC for this reason do not present the threat that led the framers to insist on a splitting of the authority of government at its very top.¹⁹ What we have, then, are three named repositories of authorizing power and control, and an infinity of institutions to which parts of the authority of each may be lent. The three must share the reins of control; means must be found of assuring that no one of them becomes dominant. But it is not terribly important to number or allocate the horses that pull the carriage of government.

Accommodating theory to the accepted present is perhaps the most difficult aspect of the task, given the highly political and informal cast of important presidential and congressional relationships with the agencies. Thus, a basic difficulty in writing about the President's legal authority over the affairs of government lies precisely in the infrequency with which that authority is tested in a legal rather than a political arena. Judicial pronouncements on presidential authority vis-a-vis the agencies, and vis-a-vis Congress, are few. But presidential dealings with Congress are daily matters of great portent, and congressional expectations about the relative authority of the President, Congress and the independents are both many and firmly established, and likely to be sharply enforced in the daily political moil.²⁰

The driving forces behind this effort include my puzzlement at the Court's difficulties and a lawyer's premise that any acceptable outcome (that does not involve constitutional amendment) must respect the Constitution's text and, at least in broad outline, its history. I hope to address the significant intellectual difficulties created by the realization that the relationship between the fact of the federal government we have today and its essentially unrevised

statutory authorization (a relationship with Congress) and a capacity on the part of the courts to assure legality (a relationship with the courts). The availability of at least limited judicial review, indeed, appears to be identified with increasing frequency as an essential element of the grant of rulemaking authority. See *INS v. Chadha*, 103 S. Ct. 2764, 2779-80 (1983); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 78-81 (1982).

19. For an account of the work of Goodnow and Willoughby strongly suggesting this differentiation between agencies and the named actors, see Grundstein, *supra* note 11, at 300-02. One must add that this checks-and-balances perspective deals only with the problem of control, and omits accounting for a "fairness" element that might be identified as central to the rationale for separation of powers—the proposition, long reflected in English ideas of "natural justice," that one is not to be a judge in one's own cause. See generally G. Wills, *Explaining America* 149-50 (1981). Perhaps it is sufficient to say that that element has never been controlling at the agency level; the *nemo iudex* idea is limited to financial and other sharply personal interests in English law, see H. Wade, *Administrative Law* 400 (4th ed. 1977), as well as our own, see *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). See *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973), and *Friedman v. Rogers*, 440 U.S. 1, 18 (1979) for an indication that even disqualifying financial interests may be asserted only in the context of particular adjudicatory proceedings. See generally Strauss, *Disqualifications of Decisional Officials in Rulemaking*, 80 Colum. L. Rev. 990 (1980).

20. President Carter, like his predecessors, firmly denied the constitutional validity of the legislative veto, but in bargaining over continued authorization for the FTC he agreed to accept a form of legislative veto, 38 Cong. Q. 1148-49 (1980); 38 Cong. Q. 1407-09 (1980), and he kept that bargain. 38 Cong. Q. 1573 (1980). See also the comprehensive listing of presidential communications in Henry, *Legislative Veto: In Search of Constitutional Limits*, 16 Harv. J. on Legis. 735, 737 n.7 (1979).

eighteenth-century formal structure is uneasy at best; that it is difficult to accommodate both the fact of the changes and our continuing assertion that the Constitution is law.²¹

To achieve this accommodation, Part I of this Article describes contemporary government, with the purpose of identifying those aspects of the political landscape that any theory of the place of agencies in government must acknowledge. Part II examines the constitutional constraints—of text, of context, and of judicial interpretation—on Congress's ability to structure the work of law-administration as it deems best, in light of the three approaches just sketched and with the results suggested. I suggest a reinterpretation of some cases now taken as the basis for our analyses of government structure, and some criticisms of cases decided in the two terms of the Court just concluded. Part III then uses considerations of checks and balances and separation of functions to analyze relationships between the President and the agencies viewed without necessary regard for their placement in the governmental structure. I suggest that as Congress structures the government, it must recognize certain constraints—the need for basic parity between it and the President in political oversight of the agencies; and the President's substantial independent authority to communicate with and give directions to those who administer the laws. There emerges a framework for understanding the scope of Congress's authority to structure American government that stresses the continuance of opposed, politically powerful actors at the apex of government by requiring that those who do the work of law-administration have significant relationships with each.

I. THE SHAPE OF CONTEMPORARY ADMINISTRATIVE GOVERNMENT

This Part of the Article seeks to describe the ways in which contemporary federal government is structured and performs its law-administration functions.²² The effort proceeds from the premise that any useful legal analysis of the limits on Congress's ability to structure administrative government must, at least in large measure, accept the reality of the existing government. To no one's surprise, the description reveals a profuse variety of formal structures and a striking dispersion of governmental authorities. Both the variety and the dispersion are inconsistent with any notion that the powers of government are or can be neatly parcelled out into three piles radically separated the one from the other and each under the domination of its particular "branch."²³ Once one descends below the level of the branch heads named in the Constitution—Congress, President, and Supreme Court—separation of powers ceases to

21. See Karl, *Executive Reorganization and Presidential Power*, 1977 Sup. Ct. Rev. 1, which also in somewhat mystic phrases illustrates and seeks to reason from the clash between politics and administrative science in the relations between President, Congress, and the continuing body of civil servants.

22. See *supra* note 11.

23. See *supra* note 15.

have descriptive power. Because agencies nonetheless exist in varying relationships with each of these paramount actors, the notion of checks and balances retains descriptive power and, hence, possible utility within the constraint of accepting the reality of the existing government.

However one counts its branches, the size alone of contemporary American administrative government places strains on the eighteenth-century model. The minimalist federal government outlined in Philadelphia in 1787 envisioned a handful of cabinet departments to conduct the scanty business of government, each headed by a Secretary responsible to the President and thinly peopled with political employees. Significant regulatory responsibilities were not in view; administration even of the public lands was decades in the future.²⁴ The eighteenth-century model relied heavily on the controls of politics over and among the branches of government to keep it within reach of the people, to subdue the risks of tyranny.²⁵

The simple model of cabinet departments has long since been supplanted by a rich variety of governmental forms. Today, President and Congress must each deal with a continuing government whose dimensions and power were unprovided for. The civil service, largely insulated from politics, may appropriately be regarded as the fourth effective branch of government²⁶ wholly without regard to the arguably special position of the independent commissions. The character of bureaucratic decisionmaking has also changed. In the modern bureaucratic context, politics is paradoxically suspect. The notions of administrative science, for example, that governmental policy could be made by objective analysis performed outside the world of politics, may have found their first foothold with the independent commissions; yet today's technological rulemakings, occurring primarily within the executive branch, are strongly influenced by those notions.²⁷

24.

[T]he conditions of national life at the beginning and through much of the nineteenth century simply did not raise the issues of management on the dynamic and shifting scale that followed the Civil War. The framers had no reason to envisage the management of an industrial nation as the essential function of the office . . . [or to] forecast the development of extensive managerial bureaucracies to tend to social policy and related problems.

Karl, *supra* note 21, at 11.

25. See *infra* text accompanying notes 102-18.

26. K. Meier, *Politics And The Bureaucracy: Policy-Making In The Fourth Branch Of Government* (1979); H. Merry, *Five-Branch Government* 59-60 (1980); E. Hargrove, *The Power of the Modern Presidency* 79 (1974).

27. At the same time as the past behavior of agencies is criticized for its want of responsiveness and responsibility and for the failures of cocooned expertise, pressure for more rationalistic and "objective" modes of decision also mounts. Detailed cost, risk, and benefit analysis techniques are put forward as alternatives to "visceral estimates and political accommodations," L. Lave, *The Strategy of Social Regulation* 6 (1981), as the basis for policy decision. Interest-group representation in the courts, through expanded judicial review, is urged as a means of securing public accountability for agency action. Stewart & Sunstein, *Public Programs and Private Rights*, 95 *Harv. L. Rev.* 1195 (1982).

The following four propositions identify the significant features of modern administrative government that any structural account based on the Constitution must encompass:

1. The federal agencies are placed in the structure of federal government—as cabinet agencies, independent executive agencies, or independent regulatory commissions—without apparent regard for the functions they are to perform. Their internal and public procedures do not vary with their placement. The functions they perform belie simple classification as “legislative,” “executive,” or “judicial,” but partake of all three characteristics.

2. All agencies, whether denominated executive or independent, have relationships with the President in which he is neither dominant nor powerless. They are all subject to presidential direction in significant aspects of their functioning, and able to resist presidential direction in others (generally concerning substantive decisions).

3. All agencies have oversight relationships with Congress and the federal judiciary, and these relationships generally do not vary with the type of agency used.

4. The characteristics of the oversight relations of President and Congress with “executive” and “independent” agencies owe as much (or more) to politics as to law.

The pages immediately following take up each proposition in turn, necessarily with a broad and merely evocative brush. Some readers may be satisfied with the propositions; they should turn at once to page xx. Yet one's impression is that many assume radical differences between executive agencies and independent regulatory commissions in functions, procedures, and relationships with the rest of government. Acknowledgement both of the variety of forms government regulators take and of the similarity of their actions and control relationships is important as a point of departure for the later discussion.

A. The Independence of Agency Function, Placement, and Structure

Congress has employed many different forms of governmental authority in allocating the day-to-day work of government. It has created cabinet departments, cabinet-level agencies headed by individual administrators responsible to the President, independent regulatory commissions, federal corporations,²⁸ independent regulatory commissions within cabinet depart-

One may fairly wonder at the wisdom of the radical exclusion of politics some thus seek. Cost-benefit analysis can inform but not resolve human equations pitting the manifold interests of various groups against one another. Invoking the judgment of lifetime appointees is a curious means for introducing democratic controls over agency functioning. The failures of administrative science to produce effective public policy might also be traced to the faulty premise that one can somehow free government of politics without also freeing it of responsibility to the people and responsiveness to those they directly select to represent their interest. Refusal to recognize the possibility of political controls over the bureaucracy's decisions, whatever the advantages of that refusal, tends to place sole reliance on the judiciary for the bureaucracy's connection with constitutional governance.

28. See, e.g., 16 U.S.C. § 831-831dd (1982) (Tennessee Valley Authority).

ments,²⁹ and more as means of carrying into execution the laws it enacts. And each of these bodies may itself be highly complex—an amalgam of agencies, administrations, offices, bureaus, and services, each headed by its own chief possessing statutory authority yet reporting to an assistant who reports to the agency head.

The allocation of law-administration among these forms does not follow simple functional lines. Although administrative law students and others²⁹ sometimes talk uncritically as if the performance of regulation were a lodestone—as if all regulatory agencies were “independent regulatory commissions”—regulatory and policymaking responsibilities are scattered among independent and executive-branch agencies in ways that belie explanation in terms of the work agencies do.³⁰ Take, for example, workplace safety: the Mine Safety Act³¹ is wholly administered by an executive department, at first the Department of the Interior and more recently the Department of Labor; the Occupational Safety and Health Act is administered in part by an executive agency, the Occupational Safety and Health Administration, and in part by an independent commission, the Occupational Safety and Health Review Commission, both placed in the Department of Labor;³² nuclear safety is in the charge of a fully independent agency, the Nuclear Regulatory Commission.³³ Similar dispersions could be noted respecting antitrust policy,³⁴ economic policy,³⁵ consumer protection from fraudulent advertising,³⁶ and even rate regulation.³⁷ The diversity is characteristic of our pragmatic ways with

29. See, e.g., Occupational Safety and Health Review Commission, 29 U.S.C. §§ 651-678 (1982) (in the Department of Labor); Federal Energy Regulatory Commission, 42 U.S.C. §§ 7171-7177 (Supp. V 1981) (in the Department of Energy).

30. That reality was well understood by the late Nathaniel Nathanson, whose essay *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the “Independent” Agencies*, 75 Nw. L. Rev. 1064 (1981), looks in much the same direction as this one.

31. 30 U.S.C. §§ 721-740 (1982).

32. 29 U.S.C. §§ 656, 661 (1982).

33. 42 U.S.C. §§ 5841-5851 (1976 & Supp. V 1981).

34. 15 U.S.C. §§ 45, 46 (1982) (Federal Trade Commission); 15 U.S.C. §§ 4, 25 (1982) (Department of Justice).

35. Council of Economic Advisors (White House), the Department of the Treasury, and the Federal Reserve Board.

36. Federal Trade Commission, 15 U.S.C. §§ 52, 53 (1982); Department of the Treasury, 27 U.S.C. § 205(f) (1982) (intoxicating liquors); 27 C.F.R. §§ 4.1-4.80 (1983) (wines); and the Food and Drug Administration (Department of Health and Human Services), 21 U.S.C. §§ 301-392 (1982).

37. Federal Energy Regulatory Commission (Department of Energy), 42 U.S.C. § 7173(c) (Supp. V 1981); Department of Agriculture, Regulations Under the Packers and Stockyards Act, 9 C.F.R. 201.17-201.200 (1983) (packers and stockyards); Interstate Commerce Commission, 49 U.S.C. §§ 10,701-10,702 (Supp. V 1981).

government, reflecting the circumstances of the particular regulatory regime, the temper of presidential/congressional relations at the time, or the perceived success or failure of an existing agency performing like functions, more than any grand scheme of government.³⁸

The diversity of form, however, ought not to conceal the substantial commonalities of internal structure, function, and procedure. Despite the attention often given asserted differences between single, politically responsible administrators and multimember independent commissions,³⁹ these organizations are more similar than different below the highest levels. In its regulatory work each is subdivided in accordance with the same principles of bureaucratic organization, relies upon staff protected by the same civil service laws,⁴⁰ performs the same functions, employs the same public procedures, and settles disputes using the same types of decisional personnel.

Imagine, for example, a single corporation operating a coal mine, a manufacturing plant, and a nuclear power station. The safety of its workplaces would be regulated by the three agencies noted above—the Department of Labor, OSHA/OSHC (also within the Department), and the NRC. From its perspective, the placement of these regulatory agencies in the structure of government is essentially irrelevant. Each “legislates” in adopting the rules the corporation is compelled to obey; each engages in executive activity in conducting investigations, adopting policies within the “legislative” framework, or deciding to initiate formal proceedings; each “adjudicates” the ensuing complaints. The Administrative Procedure Act applies equally to all agency types. Case law involving agency procedure, judicial review, or presidential and congressional oversight gives no hint that an agency’s “independence” *vel non* could be a significant factor in any decision about appropriate or fair procedures.⁴¹

38. R. Cushman, *The Independent Regulatory Commissions* (1941).

39. E.g., *The President's Advisory Council on Executive Organization, A New Regulatory Framework: Report on Selected Independent Regulatory Agencies* 13-18 (1971); Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 *Yale L.J.* 931, 935-37, 961-62 (1960); Minow, *Suggestions for Improvement of the Administrative Process*, 15 *Ad. L. Rev.* 146, 147-48 (1963).

40. 5 U.S.C. §§ 1103-1104, 2101-2105 (1982).

41. These generalizations, like almost all generalizations about administrative law, are overstated in some details; the relationship between OSHA and OSHRC, for example, has no counterpart in the NRC. Having a separate, “independent” appellate tribunal within an executive department, however, is neither the predominating pattern nor perceived as a requisite. Cf. R. Cass, *Agency Rev. of Admin. Law Judges' Decisions: A Report to the Admin. Conference of U.S.* 220 (1983); Admin. Conference of U.S., *Recommendations*, 1 C.F.R. § 305-68.6 (1983) (delegation of final decisional authority subject to discretionary review by agency); Freedman, *Review Boards in the Administrative Process*, 117 *U. Pa. L. Rev.* 546, 572 (1969) (“legislation compelling all agencies to create Review Boards would be unwise”). The Recommendation of the Administrative Conference, *Agency Structures for Review of Decisions of Presiding Officers Under the AP*, 1 C.F.R. § 305.83-3 (1983), makes no mention of review board independence.

Beyond the identity of public procedures and the frequently mixed character of agency function lies the essential similarity of the human resources of all agencies. All are predominantly staffed by civil servants protected from political reprisal in the performance of their jobs. In consequence, even agency work outside the public procedures of the APA is substantially independent of political influence, whatever the apparent place of the agency in the governmental structure. As Presidents and political scientists are fond of remarking,⁴² the White House does not control policymaking in the executive departments. The President and a few hundred political appointees are at the apex of an enormous bureaucracy whose members enjoy tenure in their jobs, are subject to the constraints of statutes whose history and provisions they know in detail, and who often have strong views of the public good in the field in which they work.⁴³ The ability to contribute to what he regards as beneficial change is often what has motivated the bureaucrat to choose public employment. Presidents come and go while the governing statutes, the bureaucrat's values, and the interactions he enjoys with fellow workers, remain more or less constant. To be sure, he can be influenced by outside pressures; obedience to authority, avoidance of the pain of antagonistic committee hearings or budget reductions, and a general desire for the good will of the political leadership are undoubted factors in his behavior.⁴⁴ Winning budget support in Congress, or office space, or effective representation in judicial proceedings, are not trivial goods—even absent the political loyalties that may derive from appointment or the sharing of general aspirations about government policy. Nonetheless the bureaucracy constitutes an independent force—indeed, that fact is in some respects the dominating problem of the current administrative law literature⁴⁵—and its cooperation must be won to achieve any desired outcome.⁴⁶

42. President Truman is reported to have described his authority as the power "to bring people in and try to persuade them to do what they ought to do without persuasion. That's what I spend most of my time doing. That's what the powers of the President amount to." C. Rossiter, *The American Presidency* 149 (2d rev. ed. 1960); see also E. Griffith, *The American Presidency, The Dilemmas of Shared Power and Divided Government* 43-51 (1976); H. Hecl, *A Government of Strangers: Executive Politics In Washington* (1977); D. James, *The Contemporary Presidency* 122-29 (1969); G. McConnell, *The Modern Presidency* 61-79 (1976); R. Neustadt, *Presidential Power—The Politics of Leadership From FDR to Carter* ch. 3 (1980).

43. For remarkable and sensitive accounts of the internal strengths and functioning of the American national bureaucracy, see the works of H. Kaufman, e.g., *The Forest Ranger* (1960) and *The Administrative Behavior of Federal Bureau Chiefs* (1981); see also H. Merry, *supra* note 26.

44. See *infra* text accompanying notes 70-74; cf. Kalt & Zupan, *Capture and Ideology in the Economic Theory of Politics*, *Am. Econ. Rev.* (forthcoming June 1984) (offering an economic justification for altruism).

45. See, e.g., H. Merry, *supra* note 26, at 59-60; Stewart, *The Reformation of American Administrative Law*, 88 *Harv. L. Rev.* 1667, 1676-88 (1975).

46. Experience under the present administration suggests this to be less clearly so when the issue is not which regulation shall be adopted, but whether regulation shall occur at all. Dismantling is perhaps one activity that—if generally tolerated—can be managed from the top.

B. Presidential Direction of Agencies

Viewed from any perspective other than independence in policy formation, the legal regime within which agencies function is highly unified under presidential direction. Many administrative functions are centrally performed, a product of congressional recognition that all agencies share many of the administrative needs of government, for which central management under presidential supervision is highly desirable.⁴⁷ Thus, the property of independent as well as executive-branch agencies is managed by the General Services Administration, and their contracts are entered in accordance with its procurement regulations.⁴⁸ The Department of Justice, to varying degrees, represents their interests in court;⁴⁹ the Office of Personnel Management and the Merit Systems Protection Board regulate their employment practices, pay scales and allocation of super-grade management posts.⁵⁰ The protection of national secrets, with one statutory exception,⁵¹ occurs under an executive order,⁵² which establishes both the regime for classification and the requirements for access; and the executive branch performs the investigations that qualify persons for clearance.⁵³ Government contracts contain nondiscrimination clauses, and an enforcement regime housed in an executive department has been established, again on the basis of an executive order.⁵⁴

47. Bruff, *Presidential Power and Administrative Rulemaking*, 88 *Yale L.J.* 451, 491-95 (1979).

48. Federal Property and Administrative Services Act of 1949, ch. 288, 63 Stat. 377 (codified as amended at 40 U.S.C. §§ 471-544 (1976 & Supp. V 1981)).

49. 28 U.S.C. § 516 (1982).

50. 5 U.S.C. § 1103 (1982) (Office of Personnel Management); 5 U.S.C. §§ 1205-1206 (1982) (Merit Systems Protection Board and Special Counsel); see also Reorganization Plan No. 2 of 1978, 3 C.F.R. 323, 323-27 (1978), reprinted in 5 U.S.C. § 1101 app. at 452-54 (1982), and in 92 Stat. 3783, 3783-85 (Office of Personnel Management and Merit Systems Protection Board powers); Implementation of Reform of Personnel Management System, Exec. Order No. 12,107, 3 C.F.R. 264 (1978), reprinted in 5 U.S.C. § 1101 app. at 456-60 (1982).

51. Atomic Energy Act of 1954, ch. 1073, §§ 141-146, 68 Stat. 919, 940-43 (codified as amended at 42 U.S.C. §§ 2161-2166 (1976 & Supp. V 1981)).

52. Exec. Order No. 12,065, 3 C.F.R. 190 (1978), as amended by Exec. Order No. 12,148, 3 C.F.R. 412, 418 (1979), and Exec. Order No. 12,163, 3 C.F.R. 435, 443 (1979).

53. There is no obvious statutory authority for either the government's loyalty-security program of the 1950's or its requirement that antidiscrimination clauses be inserted in government contracts. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 304-12 (1979); *Greene v. McElroy*, 360 U.S. 474, 502-08 (1959).

54. See Exec. Order No. 11,246, §§ 201-212, 3 C.F.R. 567 (1966), as amended Exec. Order No. 11,375, 3 C.F.R. 684 (1966-1970 Comp.); Exec. Order No. 12,086, 3 C.F.R. 230 (1978); cf. *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

The examples in the text are far from exhaustive. Thus, the Federal Advisory Committee Act requires consultation with the OMB, following criteria intended to promote representativeness and reduce the numbers of advisory committees, before any advisory committee may be created. Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. § 1 (1982)). The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, 4331-4335, 4341-4347 (1976), gives the Council on Environmental Quality a coordinative role in the review and appraisal of

Even in the arena of policy, one readily finds major respects in which agencies' work is centrally managed.⁵⁵ The National Security Council coordinates interagency studies to develop national policy at the request of the President or a possibly affected agency, without necessary regard to the independence (or lack of it) of the agencies that may be affected.⁵⁶ Similarly, the Office of Management and Budget coordinates agency comments on some proposed rules, promoting conferences and other collaborative efforts in order to produce a result maximally acceptable among all agencies concerned.⁵⁷ OMB plays a coordinating role also when agencies find themselves in the jurisdictional disputes that are the inevitable consequence of the enormous number of regulatory measures Congress enacts and the many different agencies to which it assigns responsibility.⁵⁸ Litigation or the seeking of a formal legal opinion from the Attorney General would be possible, for example, in the face of uncertainty whether the Nuclear Regulatory Commission or the Environmental Protection Agency had primary regulatory responsibility for radioactive discharges from NRC regulated plants into EPA regulated waters,⁵⁹ but the more usual course is to put the matter before OMB, which will attempt more informally to bring the agencies to an understanding.

Other White House operations involve all agencies in the formulation or implementation of overarching national policy. Most prominent may be the OMB's annual creation of a national budget expressing the President's view of the relative priorities to be accorded the various efforts of national government. While Congress has occasionally limited the discipline of the budget process by requiring agencies simultaneously to provide the appropriate congressional committees their submissions to OMB,⁶⁰ the President's coordina-

environmental impact statements throughout government. The President by executive order has authorized it to adopt rules prescribing the form those analyses must take. Exec. Order No. 11,991, 3 C.F.R. 123 (1977).

[55. The policy bases for central direction are well set out in A.B.A. Comm'n On Law And The Economy, *Federal Regulation: Roads to Reform* 68-91 (1979) [hereinafter cited as *Roads to Reform*]. See also Bruff, *supra* note 47, at 474-75. However, Congress has occasionally made judgments precluding balancing, which the President as much as the agency concerned would be obliged to respect. See *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490 (1981); Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 Colum. L. Rev. 943, 950 n.41 (1980).

56. 50 U.S.C. § 402 (1976).

57. See, e.g., Bruff, *supra* note 47, at 464-65 (discussing the "Quality of Life" review instituted by the OMB in 1971 to review environmental regulations). Although (given the political sensitivities on Capitol Hill) independent agencies' participation has been highly variable and unforced, OMB's "honest broker" function is an important one, as often useful to agencies as it is threatening. R. Katzmann, *Regulatory Bureaucracy: The Federal Trade Commission And Antitrust Policy* 140 (1980).

58. *Roads to Reform*, *supra* note 55, at 70-72, lists "sixteen federal regulatory agencies, within and outside the executive branch, each created and governed by its own separate statutes, with responsibilities that directly affect the price and supply of energy."

59. Cf. *Train v. Colorado Pub. Interest Research Group*, 426 U.S. 1 (1976).

60. The Interstate Commerce Commission, the Commodity Futures Trading Commission, and the Consumer Product Safety Commission are freed by statute from submitting to plenary

tive, policy-setting function is recognized in these provisions also. Overall, presidential coordination is an activity of importance, one in which the agencies generally cooperate and from which they receive benefit as well as occasional constraint.⁶¹

The independent agencies are often free, at least in a formal sense, of other relationships with the White House that characterize the executive-branch agencies. The President's influence reaches somewhat more deeply into the top layers of bureaucracy at an executive agency than at an independent commission. Where subsidiary officers in the executive agencies may be subject to presidential appointment and certainly require White House clearance, in the independent agencies only commissioners are appointed with required executive participation; staff appointments, even at the highest level, are made by the commission. The requirement that commission membership be at least nominally bipartisan does not prevent the appointment of political friends but doubtless lowers the political temperature. Typically, the independents have more authority to conduct their own litigation than executive-branch agencies do, although not exclusive authority. Executive-branch agen-

oversight. See 31 U.S.C. § 1105 (1982), 7 U.S.C. § 4a(h) (1982), and 15 U.S.C. § 2076(k)(2) (1982) respectively. While current proposals of regulatory reform consider whether to exempt all independent regulatory commissions from OMB budgetary and legislative discipline, earlier congressional reaction to agency independence from budgetary discipline was quite the opposite. The Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 (reorganized by P.L. No. 97-258, § 1, 96 Stat. 877 (1982), codified as reorganized in scattered sections of 31 U.S.C.), which established a Bureau of the Budget within the Treasury Department, directed every department and establishment to furnish budget information to the Bureau, and that was taken to include the independents. *Id.* § 207, 42 Stat. 22. The only exceptions were for "the Legislative Branch of the government and the Supreme Court" which were to transmit their estimates to the President for inclusion in the budget without revision. *Id.* §§ 201(a), 213, 42 Stat. 20, 23. In 1939 the act was amended specifically to include "any independent regulatory commission or board" among the agencies subject to the budget act. Reorganization Act of 1939, ch. 36, 53 Stat. 561, 565 (codified at 31 U.S.C. §§ 701, 1101 (1982)). Representative Warren, a member of the Select Committee on Governmental Organization, explained this measure to the House in the following words: "With respect to title II of the bill, under the decision in the Humphrey case, we had something new to appear down here in respect of some of these agencies. They shrugged their shoulders and said 'We are not under any budgetary control,' quoting that case . . . Now, all that title II does is to bring every single, solitary one of them under Budget control, and I believe everybody in this House favors that." 84 Cong. Rec. 2315 (1939); see also 84 Cong. Rec. 2306 (1939) (Rep. Cochran).

61. See, e.g., R. Katzman, *supra* note 57, at 140:

[M]anagement specialists in the Commission regard the OMB as a useful ally in instituting organizational changes that are designed to centralize control and are opposed by the bureau heads. Commented one commission staff member who worked closely with the executive director: "We know the bureau heads do not like procedures which enable the chairman and the other commissioners to get a better idea about what the troops are doing. So, we tell them it's just not a question of what the chairman and the other commissioners want. The Office of Management and Budget, which could make trouble for us, will react unsympathetically to requests for more attorneys if we don't accommodate them by tightening up our management systems."

cies have an obligation to clear legislative matters—draft statutes, budget submission, even testimony—with the Office of Management and Budget, an obligation from which some of the independents are excused.⁶² One recent statute, the Paperwork Reduction Act of 1980,⁶³ specifically empowers the independents to overrule by majority the Presidential directives respecting the collection of information to which executive branch agencies are bound.⁶⁴ As a political matter, recent Presidents have not required the independent commissions to participate in the centralized oversight of rulemaking associated with presidentially required cost-benefit analyses of major proposals for rule-making.

Yet these differences are at best matters of degree, overstated if taken to imply a rigor in control in the executive branch. Even in executive agencies, the layer over which the President enjoys direct control of personnel is very thin and political factors may make it difficult for him to exercise even those controls to the fullest. An administrator with a public constituency and mandate, such as William Ruckelshaus,⁶⁵ cannot be discharged—and understands that he cannot be discharged—without substantial political cost. Also for political reasons, one may be certain that independent commission consultation with the White House about appointments often occurs, even if subdued—as in so many other matters—by the lack of obligation so to consult.

Presidential influence over the independent agencies is heightened by the special ties existing between the President and the chairmen of almost all of the independent regulatory commissions. Although all commissioners, including the chairmen, are appointed to fixed terms as commissioners, the chairman generally holds that special post at the President's pleasure.⁶⁶ His posi-

62. Commodity Futures Trading Commission, 7 U.S.C. § 4a(h) (1982) (budget estimates, testimony, and legislative recommendations); Consumer Product Safety Commission, 15 U.S.C. § 2076(k) (1982) (same); Federal Election Commission, 2 U.S.C. § 437d(d) (1982) (same); Interstate Commerce Commission, 31 U.S.C. § 1105 (1982) (budget estimates). Compare the budgetary discipline to which agencies must otherwise conform. See *supra* note 60.

63. Pub. L. No. 96-511, 94 Stat. 2812 (codified as amended at 5 U.S.C. § 5315 (1982), 20 U.S.C. § 1221, 30 U.S.C. §§ 1211-1213 (1982), 42 U.S.C. § 292h (Supp. V 1981), 44 U.S.C. §§ 2904(10), 2905, 3501-3520 (Supp. V 1981)).

64. 44 U.S.C. § 3507(c) (Supp. V 1981). By requiring initial clearance from OMB and a public, reasoned act to overrule its guidance, even that provision suggests congressional respect for the President's central, coordinative function.

65. Mr. Ruckelshaus first served as administrator of the Environmental Protection Agency during the Nixon and Ford Administrations and was called to serve again during the Reagan Administration. He acquired a strong reputation for energetic and independent administration during his first term. See J. Quarles, *Cleaning Up America: An Insider's View of the Environmental Protection Agency* (1976). This reputation underlay the choice of him to replace Anne Gorsuch Burford, President Reagan's first administrator for the agency, after her resignation in the midst of strong criticism of her stewardship. See *infra* note 351.

66. See D. Welborn, *Governance Of Federal Regulatory Agencies* 6-7, 37, 141 (1977); W. Cary, *Politics And The Regulatory Agencies* 5-24 (1967). The chairmen of the Federal Reserve Board and the Consumer Product Safety Commission enjoy statutory protection of tenure. 12 U.S.C. § 241 (1982) (Federal Reserve Board); 15 U.S.C. § 2053 (1982) (Consumer Product Safety

tion, moreover, gives him special influence over the agency's course, making it particularly likely that his views will find acceptance. Professor David Welborn's interesting and thorough study of regulatory commission chairmen reveals that they almost completely dominate the administrative side of commission business, selecting most staff, setting budgetary policy, and as a consequence commanding staff loyalties.⁶⁷ These administrative responsibilities, corresponding to presidential responsibilities for the government as a whole, doubtless underlie Congress's general recognition of the President's special claim to have his own choice as chairman.⁶⁸ Perhaps more surprisingly, the chairmen also dominate commission policymaking: commanding the staff, they are far less often in dissent from commission policy decisions than their colleagues. Here the White House connection is often less direct and generally more subtle,⁶⁹ but consultation and coordination on general policy issues of national interest naturally occurs.⁷⁰

C. Agency Relations With Congress and the Courts

Within the domain of agencies we are discussing,⁷¹ the existence of statutory limits and the potential enforcement of those limits in the courts imply oversight relationships in addition to those that agencies may have with the White House or the Secretary. In any matter of importance, the public, the press, the intended subjects of the policy, the courts, and interested congressmen and their staffs also become involved. And one may search both the law and the literature on congressional-bureaucratic relationships⁷² or the operation of judicial review⁷³ in vain for an indication that the relationships between these overseers and the agencies varies in any regular way in accordance with agency structure. The rules of judicial review distinguish between

Commission). The Federal Reserve Board, at least, operates in a setting in which public confidence has long been thought paramount, and Congress seeks no oversight of its own. See also Bruff, *supra* note 47, at 496, 499; Roads to Reform, *supra* note 55, at 85.

67. See generally D. Welborn, *supra* note 66.

68. It is not surprising to find, then, that most major internal reorganizations of regulatory agencies, undertaken at the chairmen's initiative, have coincided with the election of a new President. The personal, political loyalty of the chairman assures the President a substantial impact on agency administration, and consequent influence on policy.

69. Occasional political firestorms—such as the reaction to President Reagan's reported conversations with the FCC chairman concerning formulation of FCC television syndication rules—serve as reminders of the values the public and Congress attach to independence in substantive agency decisionmaking. See N.Y. Times, Nov. 4, 1983, at C26, col. 1.

70. See W. Cary, *supra* note 66, at 23-26.

71. See *supra* note 11.

72. E.g., R. Arnold, *Congress and the Bureaucracy: A Theory of Influence* (1979); W. Gellhorn, C. Byse & P. Strauss, *supra* note 2, at 103-26; W. Niskanen, *Bureaucracy and Representative Government* 138-68 (1971); Fiorina & Noll, *Voters, Legislators and Bureaucracy: Institutional Design in the Public Sector*, 68 Am. Econ. Rev. (Papers and Proceedings) 256-60 (1978); Weingast & Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. Pol. Econ. 765 (1983).

73. See, especially, R.S. Melnick, *Regulation and the Courts* (1983).

those proceedings held "on the record" and those that are not, but express no differences for such proceedings held in one type of agency or another. So also for congressional oversight relationships: budgetary controls, investigations, hearings, and all the general apparatus of congressional oversight are brought to bear across the board. As has often enough been noted, these relationships can be particularly important; congressmen and committee staffs tend to be longer-lived than Presidents and their appointees, and through hearings and budgetary actions can work much mischief.⁷⁴

There are, to be sure, differences of tone. The uncertainty about what "independence" means shapes the behavior of the Congress, the President and the agencies alike. Congressmen tend to talk about the independent commissions in a proprietary way—these are "our" agencies, not so much independent as independent-of-the-President. One result of this attitude—hard to measure but suggested by local belief—may be a greater intensity of congressional political oversight of the independents. Even if congressional oversight is not itself measurably more intense, it may be the more effective if not answered by counterpressures; as a former FTC Chairman recently remarked, the independent agencies "have no lifeline to the White House. [They] are naked before Congress, without protection there," because of the President's choice not to risk the political cost that assertion of his interest would entail.⁷⁵ In any event, Congress's techniques do not vary; no particular form of dominion is asserted over "independent" agencies that is not practiced also on the agencies associated more directly with the White House. And, as already indicated, Congress generally provides for a large measure of presidential participation in the day-to-day administration, if not the policy formation, of those agencies.

D. The Character of Presidential and Congressional Oversight Relations with Agencies is Determined as Much by Politics as by Law

Perhaps the central fact of legislative-executive management of oversight relationships with the agencies is the extent to which behavior is determined by political factors rather than law. The White House's treatment of cost-benefit analysis by independent regulatory commissions in conjunction with major rulemakings is a notable example. Both President Carter and President Reagan were advised (correctly, in my view) that they had authority to include the independents in their executive orders promoting economic analysis of proposed rules as an element of regulatory reform.⁷⁶ Neither did include those

74. See generally E. Corwin, *The President: Office And Powers 1787-1957*, at 184-85, 266-67, 291-95 (4th rev. ed. 1957); H. Hecl, *supra* note 42.

75. Remarks of Calvin Collier, Assembly of the Administrative Conference of the United States, Washington D.C. (Dec. 15, 1983). Chairman Collier noted only three respects in which independent and executive agencies differ: the set term of office, the statutory efforts to attain bipartisan membership on the Commissions, and the practical difference noted in the text.

76. See Executive Orders Nos. 12,044, 3 C.F.R. 152 (1979) (Carter), and 12,291, 46 Fed. Reg. 13193 (1981), reprinted in 5 U.S.C.A. 601 (West Supp. 1983) (Reagan). President Carter was

agencies, reasoning that the political costs of arousing congressional opposition, perhaps to the order as a whole, would be too great.⁷⁷ In fact, the independents generally have complied with these executive orders: they have participated in the Regulatory Council, publish regular agendas of rulemaking, are attentive to White House inquiries about their progress, and otherwise behave as if they were in fact subject to the discipline from which they have been excused.⁷⁸

The reasons for this acceptance of presidential input are clear. the president's effective power over the independents would counsel against excluding

advised by the Department of Justice on the power to bind the independent regulatory agencies to the requirements of Exec. Order No. 12,033, see 43 Fed. Reg. 12,670 (1978), and wrote to the heads of the independent regulatory agencies urging them to follow Exec. Order No. 12,044. A copy of the letter is at 14 Weekly Comp. Pres. Doc. 563 (1978). See also Congressional Research Service, *Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues That May Be Raised By Executive Order No. 12,291* (Comm. Print 1981); Hearings On S. 344 and S. 1080 before the Senate Comm. on Governmental Affairs, 97th Cong., 1st Sess. 319-440 (1981); U.S. Dep't of Justice, *Memorandum re Proposed Executive Order on Federal Regulation 7-13* (Feb. 12, 1981) (addressing the question of the legality of applying proposed Executive Order No. 12,291 to the independent regulatory agencies), reprinted in *Role of The Office of Management and Budget in Regulation: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess. 158-64* (1981) [hereinafter cited as *Hearings*].

77. Most of the activities the executive orders sought to reach occurred within the executive branch; even though the rationale for the orders plainly reached the independents' activities, the White House could afford to give up on compliance at the fringes of its concerns in order to avoid a political ruckus—particularly if voluntary compliance could be expected. See remarks of C. Boyden Gray, Counsel to Vice President Bush and the Presidential Task Force on Regulatory Relief, quoted in *Hearings*, supra note 76, at 94 (reprinting a transcript of the Hall of Flags Regulatory Reform Briefing Before the United States Chamber of Commerce).

78. As reported in *The First 100 Days of E. O. 12291*, a report to the Presidential Task Force prepared by OMB, and released June 13, 1981, reproduced in *Hearings*, supra note 76, at 308-27:

Independent Agency Actions: On March 25 Vice President Bush sent a letter to the "independent" regulatory agencies asking them to comply voluntarily with Sections 2 and 3 of the Executive Order and to comply with its overall spirit "to demonstrate to the American people the willingness of all components of the Federal Government to respond to their concerns about the unnecessary intrusion of government into their daily lives." Seven agencies have responded to the Vice President's request so far (Civil Aeronautics Board, Federal Emergency Management Agency, Federal Energy Regulatory Commission, Federal Home Loan Bank Board, Federal Mine Safety and Health Review Commission, Interstate Commerce Commission, and the Securities and Exchange Commission). All of these agencies indicated their willingness to abide by the spirit and principles of the Executive Order.

Id. at 315.

A copy of Vice President Bush's letter to the independents and the agency responses is found in *Hearings*, supra note 76, at 177-94. See also *Implementation of the Paperwork Reduction Act of 1980: Hearings Before the Subcomm. on Federal Expenditures, Research, and Rules of the Senate Comm. on Governmental Affairs, 97th Cong., 2d Sess. 41-42* (1982) (list of agencies required by OMB to estimate number of hours required of public to comply with federal government requests for information).

79. A typical instance involved an appeal to Theodore Sorenson of the Kennedy administration to expedite consideration of the Federal Power Commission's budget. At the time the

his concerns even if political loyalties did not command attention.⁷⁹ If the President's policies make good sense, or the importance or utility of coordination or a single policy is evident, the independents can be expected to comply. Its members are likely to understand that the view they bring to policy issues is intentionally specialized and shaped by the particular matters put into their charge, and that the President is in a position to learn and appreciate the views of other responsible agencies, and to supply a useful broader perspective.⁸⁰

Another important consideration lies in the commissions' need for presidential good will. Congressional oversight can be just as political as presidential oversight and, with 535 members of Congress, much more complicated.⁸¹ It can be useful to be associated with national policy, to have a big and politically powerful "friend," when appearing before Congress. The commissions need goods the President can provide: budgetary and legislative support, assistance in dealing with other agencies, legal services, office space, and advice on national policy. They share a commitment to achieving the public interest, and are likely to respect the President's motives and appreciate his political responsibility and support. They are flattered when their own advice is sought, and respectful of office when they are advised. In the circumstances, it is not surprising that the independent commissions can be susceptible to substantial presidential oversight.

On the other hand, for the executive agencies as well as for the independent commissions, the extent of presidential authority to command particular outcomes is uncertain, and the political context constrains as well as empowers presidential intervention. Congressional relationships not only serve as a source of unwanted pressure, but also can be used fruitfully to resist presidential pressures to do what the bureaucrat regards as wrong. The press

Commission was engaged in a dispute with the Department of the Interior, the Commission's position being in opposition to the administration's. Sorenson made it known that his attention would return to the FPC's budget about the time it resolved its dispute with the Interior Department in favor of the administration.

80. See *supra* text accompanying notes 55-59. It is also the case that many general skills required by agencies are more efficiently exercised by a central authority. Consider, for example, the frequent provision for self-representation by the independent agencies on judicial review of their decisions. See, e.g., 12 U.S.C. § 1828(c)(7)(D) (1982) (comptroller of currency, Federal Reserve Board and Federal Deposit Insurance Corporations); 15 U.S.C. § 56(a)(2) (1982) (Federal Trade Commission); 28 U.S.C. § 2323 (1976) (Interstate Commerce Commission authorized to represent itself as a party); *id.* § 2348 (1976) (same authority granted to Federal Communications Commission, Federal Maritime Commission, and the Nuclear Regulatory Commission). Such provisions are responsive to the concern that the President's Department of Justice might not be sufficiently understanding of their positions. Yet what self-representation in court gains for the agencies in ability to defend their particular policies, it loses in capacity to deal with the common issues that characterize much judicial review of agency action: compliance with general statutes, such as the Administrative Procedure Act or the Freedom of Information Act, 5 U.S.C. § 552 (1982), standing, ripeness, and other like issues of reviewability, general standards of review, and, at an operational level, reputation and litigating competence in the judicial forum.

81. See Weingast & Moran, *The Myth of the Runaway Bureaucracy: The Case of the FTC Regulation*, May/June 1982, at 33.

and others can also be brought into play. Finally, the governing statute, with the limited set of factors it may identify as relevant to any given policy decision and the assignment of primary decisional responsibility it makes, also serves to constrain the President's influence.

The limited documentation of the process by which OMB and other executive offices participate in rulemaking accounts for the informal nature of the conclusions of this Part as well as public fears of improper pressure. Much takes place over the telephone or in informal meetings, from which documentation is unlikely. OMB naturally fears that exposure, particularly to Congress, is likely to diminish its influence. The production of written documents takes precious time and resources from other tasks. And, much as our society values openness, it remains true that candor and the flexibility necessary for collaboration or compromise are more likely to flourish in the shade.⁸² Yet one should not rush from acknowledging the paucity of information to the judgment that Congress's assignments of responsibility have been undone, that the President enjoys an iron control over the work of law-administration. Both because statutes place decisional authority in the agencies, not the President, and because the White House often lacks the personnel and knowledge to make detailed judgments about policy content, actual as well as legal placement of final decision generally remains with the agencies.⁸³

82. Consider the following exchange between Representative John D. Dingell (D-Mich.), Chairman of the House Committee on Energy and Commerce and of the Subcommittee on Oversight and Investigations, and James C. Miller III, Administrator for Information and Regulatory Affairs, Office of Management and Budget, and Executive Director, Presidential Task Force on Regulatory Relief, after Dingell requested copies of the fifty-five rules returned by OMB to an agency for review:

D: I will not ask for the originals. I will just ask for copies, and the Chair will advise I will be quite content to receive those.

. . . M: We do not have an original.

D: Well, who has the original?

M: Sir, the flow of paper into our office is awesome. Under the Paperwork Reduction Act, the irony is that the paperflow in our office has increased from something like 3,000 transactions to 12,000 transactions, and so we do not even . . .

D: I am impressed but all I am asking for is copies of papers that are supposed to be in your files.

M: I do not know how you allege that, sir, not knowing what our filing system is. I have just said that we do not keep copies of the regulations.

Hearings, *supra* note 76, at 112.

83. The recent controversies between OSHA and OMB over alteration of that agency's cotton dust and lead rules suggest the agency's effective initiative and authority. See *Legal Exposure Limits To Be Retained*, *Legal Times*, May 30, 1983, at 1 col. 1. To the same effect, see the Environmental Protection Agency's lead standards, 40 C.F.R. §§ 60.120-.123, 60.180-.186 (lead smelters) (1983); 40 C.F.R. § 50.12 (ambient air quality standards for lead) (1983). For accounts of presidential interventions at EPA in prior administrations, see B. Ackerman & W. Hassler, *Clean Coal/Dirty Air* 86-103 (1981); J. Quarles, *supra* note 65 at 117-42; Pedersen, *Formal Records and Informal Rulemaking*, 85 *Yale L.J.* 38, 51-59 (1975).

In sum, any assumption that executive agencies and independent regulatory commissions differ significantly or systematically in function, internal or external procedures, or relationships with the rest of government is misplaced. Our government is characterized by a profusion of forms, each related in significant ways to Congress, President and Court. The choice of form has little relation to the work they do or the manner in which they perform it.

II. THE LIMITED CONSTITUTIONAL INSTRUCTIONS ABOUT THE PLACE OF AGENCIES IN GOVERNMENT

Just as the contemporary facts of the administrative state constrain any effort to describe it in purely legal and theoretical terms, so for a lawyer do the existing bodies of textual and decisional prescription of the Constitution. Although the latter resources are open to reinterpretation and fresh understanding—in the very light, for example, of the contemporary facts of government—the flexibility to reshape language or find error in past conception is no license to disregard them. An overall sense of continuity, of being anchored in the text and its interpretations, is central to our sense of the Constitution's place. This Part of the essay examines in turn those legal resources—constitutional text, context, and interpretation—to see what constraints they may impose on Congress's undoubtedly large authority to structure the inferior parts of the federal government.

From this examination will emerge three general propositions about the three theoretical approaches to understanding the place of agencies in government identified in the introduction.⁸⁴ The first is that, as a textual and interpretational matter, the separation-of-powers model need and probably should be taken no further than its use for understanding the interrelationships of the three named actors (Congress, President, Court) at the very pinnacle of government. Subject to definitional issues, we accept (and the Constitution is reasonably explicit) that, as among them, only Congress may legislate, only the Supreme Court may adjudicate, and only the President may see to the faithful execution of the laws; and each is to have a significant function in these respects. In this way, "separation of powers" remains vital in suggesting the forms of control each of the three may exercise over the bulk of government. Yet in the agencies, as we have seen, powers are not in fact separated and they are not responsible to only one of these actors. Although agencies certainly can be formally placed in one or another of the executive, legislative, or judicial branches (but not more than one, if we are rigorously to pursue the separation idea), that signifies little for the functions they perform. No compelling textual or interpretive mandate requires such a formal placement to be effected.

A second proposition emerging from the cases is that considerations of individual fairness more closely associated with the idea of separation of

84. See *supra* text following note 14.

functions often underlie the cases in which the idea of separation of powers appears to have played a significant role. The impulses for both congressional and judicial action may arise from individuals' needs for protection from political intervention in particular cases more than any general theory about place in government; the former can be provided without necessary regard for the latter.

Finally and perhaps most importantly, the text and particularly the context suggest a series of postulates about necessary relationships between the President and administrative agencies—relationships readily understood in checks-and-balances terms. The important constraint on Congress's ability to structure the work of law-administration lies in the need to perpetuate the tensions and interactions among the three named heads of the Constitution. Whatever arrangements are made, one must remain able to characterize the President as the unitary, politically accountable head of all law-administration, sufficiently potent in his own relationships with those who actually perform it to serve as an effective counter to a feared Congress. The central inquiry is to identify those relationships that are necessary, either to conform with the constitutional text or to preserve the possibility of the President's continuing effectiveness. Since this inquiry remains entirely sensible in the face of the facts of contemporary government—and indeed the political counterweight idea has lost none of its compulsion for us—the checks-and-balances approach remains a useful tool for analyzing and suggesting possible limits on Congress's ability to structure the administrative process.

A. The Text and Context of the Constitution

The text and structure of the Constitution impose few limits on Congress's ability to structure administrative government. One scanning the Constitution for a sense of the overall structure of the federal government is immediately struck by its silences. Save for some aspects of the legislative process, it says little about how those it names as necessary elements of government—Congress, President, and Supreme Court—will perform their functions, and it says almost nothing at all about the unelected officials who, even in 1789, would necessarily perform the bulk of the government's work. Thus, article I describes in some detail the makeup of the House and Senate, the subjects on which they might act, and the manner in which they may effectively legislate; but even this relatively full description talks only to the authority and actions of elected officials. One finds no mention there of important aspects of Congress's work, or of most persons who now work on its behalf—committees and their staffs, the General Accounting Office, the Congressional Budget Office, the Library of Congress.⁸⁵

85. To be sure, the committee system became particularly important with the emergence of the political party, and the explosive growth in staff has occurred in recent years. Nonetheless, it seems fair to describe article I as assuming much of what a legislature does, and providing only for what seemed likely to prove controversial or dangerous to citizens or the states.

For articles II and III, the limitations of description are even more striking.⁸⁶ Article II speaks directly only about elected officials, chiefly the President and his powers; it describes those powers in the most summary of terms. He is vested generally with "the executive Power,"⁸⁷ but what that is in the domestic context does not readily appear.⁸⁸ Putting aside foreign relations and military authority—a very large part of the Presidency, but not the focus of this essay⁸⁹—he has the following powers and/or responsibilities:

to appoint those "Officers of the United States . . . which shall be established by Law," subject to the requirement of senatorial confirmation and to the possibility that Congress might effectively limit this power to appointing "the Heads of Departments";⁹⁰

to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices";⁹¹

"from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration" proposed legislation;⁹²

to "take Care that the Laws be faithfully executed."⁹³

These provisions suggest a supervisory, perhaps even caretaker presidential role, in relationship to shadowy "executive departments" from which opinions might be sought. One is left to infer that there would be other officers possessing legal authority to act for the government, and one simply is not told whether the President or those officers are to act on those opinions.

Article III is more direct, denying any need for inferior federal courts unless and to the extent Congress chose to create them. Only the Supreme Court is a required element of the federal judiciary, and even for that institution central issues are left unspoken—its number, its term, its authority over the work of the other named actors. In almost all significant respects, then, the job of creating and altering the shape of the federal government was left to

86. The ordering reflects the anticipated ordering in importance of the powers thus separated and the bodies exercising them. See *The Federalist* No. 51 (J. Madison) (Congress inevitably the most powerful); *The Federalist* No. 78 (A. Hamilton) (judiciary as "least dangerous" branch); G. Wills, *supra* note 19, at 128-29.

87. U.S. Const. art. II, § 1, cl. 1.

88. Both the legislative and the judicial powers are enumerated in the Constitution, the former by a reference to "POWERS HEREIN GRANTED," U.S. CONST. ART. I, § 1, THE LATTER BY A STATEMENT WHAT IT "SHALL EXTEND TO." U.S. CONST. ART. III, § 2. "[W]HETHER INTENTIONAL OR NOT, [THE ABSENCE OF ANY SIMILAR LANGUAGE FROM THE VESTING CLAUSE OF ARTICLE II] ADMITTED AN INTERPRETATION OF EXECUTIVE POWER WHICH WOULD GIVE TO THE PRESIDENT A FIELD OF ACTION MUCH WIDER THAN THAT OUTLINED BY THE ENUMERATED POWERS." C. THACH, *THE CREATION OF THE PRESIDENCY 1775-1789*, AT 138-39 (1923).

89. See *supra* note 11.

90. U.S. Const. art. II, § 2, cl. 2.

91. U.S. Const. art. II, § 2, cl. 1.

92. U.S. Const. art. II, § 3.

93. *Id.*

the future—to the congressional processes suggested by Congress's authority to adopt any law "necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."⁹⁴

If one moves outward from the text to its structure, the context in which it was drafted, the records and debates of the constitutional convention, and its initial implementation by the first Congress, one can identify a number of fundamental underlying judgments.⁹⁵ The text's omission to provide for the "Departments" it occasionally refers to⁹⁶ reflects a parliamentary history in which quite detailed proposals for cabinet structure were put forward. Some decisions respecting the allocation and sharing of power within such a structure were clearly taken, but then a determination was made to eschew detailed prescription as a means of underscoring presidential responsibility and preserving congressional flexibility within the constraints of the judgments that had been made.

1. *The President is to be a Unitary, Politically Accountable Head of Government.* — Of the decisions clearly taken, perhaps none was as important as the judgment to vest the executive power in a single, elected official, the President. The question was early debated. Roger Sherman, for example, believed that the executive should be subsidiary to the legislature, whose members "[w]ere the best judges of the business which ought to be done by the Executive department, and consequently of the number necessary from time to time for doing it. . . . [T]he legislature should be at liberty to appoint one or more as experience might dictate."⁹⁷ His views were defeated, however,⁹⁸ as were the views of those who would have provided in the Constitution for the sharing of executive authority with a council of revision or a council of state.⁹⁹ Even if monarchy was rejected for the new nation, that model of executive power was a familiar one. While it was understood that there would be departments responsible for daily administration, the Conven-

94. U.S. Const. art. I, § 8, cl. 18.

95. For a brief and well-regarded analysis of the development of article II, see C. Thach, *supra* note 88.

96. Departments are referred to in the necessary and proper clause of article I ("any department") and the opinion in writing ("executive Departments") and appointment ("Heads of Departments") clauses of article II.

97. 11 M. Farrand, *The Records of the Federal Convention of 1787*, at 65 (1911).

98. *Id.*; C. Thach, *supra* note 88, at 89-90.

99. All of the proposals for a formal advisory body were defeated, despite the convention's concern that the President receive sound advice. 1 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 159, 164, 214, 243, 257, 292 (J. Elliot ed. 1866 & Photo. reprint 1941) [hereinafter cited as *Elliot's Debates*]; 1 M. Farrand, *supra* note 97, at 93-102, 138-40; 2 *id.* at 73-80, 298, 367, 537-42. Thach ascribes the rejections to the experience in the states following the Revolution, in which governors encumbered by councils had proved weak and unable to provide either efficient administration or effective resistance to the power of state legislatures; New York, the one state whose governor was not so burdened, had seemed a model of efficient government. C. Thach, *supra* note 88, at 25-54.

tion clearly and consciously chose a single and independent executive over a collegial body subject to legislative direction.¹⁰⁰ "The principle that executive efficiency and executive responsibility varied in inverse proportion to the size of the executive body had been so strongly inculcated and in so many different ways that it was strong enough to force the acceptance of a new principle of executive organization."¹⁰¹ That choice is one of central importance to the arguments of this essay; however the executive power is defined, it is argued, it must be in ways that respect this quite fundamental structural judgment.

If the Convention was clear in its choice of a single executive—and its associated beliefs that such a person might bear focused political accountability for the work of law-execution and serve as an effective political counterweight to Congress—it was ambivalent in its expectations about the President's relations with those who would actually do the work of law-administration and desirous of the advantages of congressional flexibility in defining the structure of government within the constraints of this choice. "The beginning of wisdom about the American Presidency is to see that it contains both principles [that is, administrative responsibility subordinate to the legislature and political equality with it] and to reflect on their complex and subtle relation."¹⁰² Thus, the shadowy references to executive departments and, in particular, the opinions in writing clause,¹⁰³ seem to be residues of propositions such as Gouverneur Morris's proposal in the final days of the Convention for a council of state composed of the Chief Justice and Secretaries of Domestic Affairs, State, Foreign Affairs, War, Marine, and Commerce and Finance.¹⁰⁴ The Morris proposal would have respected the central political structural judgments that had been made. Under it, each of the identified departments and their Secretaries were to have been granted specific duties—for example, the Secretary of Domestic Affairs was "to attend to matters of general policy, the state of agriculture and manufactures, the opening of roads and navigations, and the facilitating communications through the United States; and he shall, from time to time, recommend such measures and establishments as may tend to promote those objects."¹⁰⁵ Yet each Secretary was distinctly under Presidential control, holding office at the President's pleasure. As a body, they were to be available to the President for the discussion of any matter he might choose to submit, and he could require from them "written opinions." Although each was to be "responsible for his

100. The *Federalist* No. 70 (A. Hamilton), the first of the *Federalist* papers addressing the requisites of the presidency, is given over entirely to this choice, as the most important of the choices made, in its tendency to promote decisiveness and responsibility.

101. C. Thach, *supra* note 88, at 89.

102. Storing, *Introduction to C. Thach*, *supra* note 88, at vii.

103. U.S. Const. art. II, § 2, cl. 1. See *supra* text accompanying note 91.

104. See C. Thach, *supra* note 88, at 119-24; see also *id.* at 100, 138-39 (Morris's strong influence on article II).

105. 1 Elliot's Debates, *supra* note 99, at 250.

opinion on the affairs relating to his particular department,"¹⁰⁶ the possibility of ultimate decision was placed elsewhere: the President "shall, in all cases, exercise his own judgment, and either conform to such opinions, or not, as he may think proper."¹⁰⁷

Certainly one consideration underlying rejection of the Morris proposal was the wish to leave to successive Congresses, through the medium of the necessary and proper clause, the flexibility required for shaping the government to the demands of changing circumstances. Another consideration was to enhance the accountability—and thus the power—of the President by denying him the chance to hide behind a council's approval of his acts.¹⁰⁸ Indeed, the immediate working out of the constitutional scheme by the first Congress largely paralleled the Morris proposal. Cabinet departments were promptly established, with day-to-day responsibilities for administration, but reporting to the President.¹⁰⁹ Following the Morris model, a practice of cabinet consultation on important issues, nonbinding but respected, quickly arose.¹¹⁰ Presidential control over the cabinet was assured by the provision in this legislation—the decision of 1789, as it came to be regarded,¹¹¹—that the Secretaries were to serve at the President's pleasure, not for a term of years, and thus could be removed by him without cause or senatorial assent.¹¹²

106. 1 *Id.* at 250.

107. *Id.* at 251.

108. C. Thach, *supra* note 88, at 125. It is possible also to view the decision not to adopt the proposal as one largely of style. Note the curious wording of the necessary and proper clause, which speaks only of "powers vested by this Constitution . . . in any Department or Officer," not of powers vested by the legislature. It seems that the draftsmen continued to regard the departments as having a constitutional shape and constitutionally vested powers, whether or not made explicit. This lapse may be no more than stylistic, attributable to the heat of the Philadelphia summer and of other, more important controversies among the draftsmen.

109. Act of July 27, 1789, ch. 4, 1 Stat. 28 (Department of Foreign Affairs); Act of August 7, 1789, ch. 7, 1 Stat. 49 (Department of War); Act of September 2, 1789, ch. 12, 1 Stat. 65 (Department of the Treasury); Act of September 22, 1789, ch. 16, 1 Stat. 70 (Postmaster General); Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73 (Attorney General).

110. See A. McLaughlin, *A Constitutional History Of The United States* 238-47 (1935).

111. See *Myers v. United States*, 272 U.S. 52, 143 (1926).

112. Location of the appointment power in the President, with senatorial advice and consent, had not finally been decided upon for all officers of government until the closing days of the Constitutional Convention; see Hart & Wechsler, *supra* note 2, at 6; 2 M. Farrand, *supra* note 97, at 498-90, 538-40; and Hamilton had assumed in *The Federalist* No. 77 that "the consent of [the Senate] would be necessary to displace as well as to appoint." *Federalist* No. 77, at 459 (C. Rossiter, ed. 1961). The question of removal authority was not explicitly discussed at the convention and was treated as open in the legislative debates of 1789; the decision to leave it with the President—carried in the Senate, after secret debate, by the Vice President's vote to break a tie—could well be regarded as one of political wisdom or respect for George Washington rather than a reflection of what the legislators experienced as constitutional compulsion. (The House debates are summarized in *Myers v. United States*, 272 U.S. 52, 111-39 (1926), and may be found in 1 T. Benton, *Abridgement Of The Debates Of Congress*, 85-90, 102-08 (New York 1857).) The failure of the convention to place the removal power explicitly in the President alone led to a constitutional crisis when President Andrew Johnson dismissed Secretary of War Stanton in apparent violation of the Tenure of Office Act, ch. 154, 14 Stat. 430 (1867), see A. McLaughlin, *supra* note 110, at 662-75, and the question of senatorial participation in removal that act raised was not

One ought not, however, mistake the drafters' possible ambivalence about presidential role and their willingness to trust the issue of governmental superstructure to future Congresses for a willingness to see the President assigned a role distinctly subordinate to Congress. In providing that Congress need not be convened until December of each year,¹¹³ the draftsmen plainly anticipated a substantial executive function. Congress's articulated functions lay in the passage of legislation to create the framework of government and then to set the standards and appropriate the funds by which the business of government would be carried on. Inevitably that legislation would be episodic—enacted without necessary care for its relationship to existing law and having to be applied to future events, not foreseen, in light of the then existing corpus of law and the exigencies of the moment. Executive authority had to provide correctives for these inherent difficulties, and it was important that the chief executive have a body of individuals, held in his confidence, with whom to consult. The responsibility of government was to be focally his; but day-to-day administration and decision, of necessity, was to be entrusted to the hands of others.

2. *The Maintenance Of Tension Among The Named Bodies.* — A central, coordinating and overseeing role for the President in relation to all government "officers" is required, also, to permit that office to serve as an effective check on the otherwise to be feared authority of Congress. The framers sought both to create a more effective national government than they had previously experienced, and to make it resistant to domination by transitory majorities or those who for the moment might be the public's political representatives. To those ends, the governmental structure they created embodied both separated powers and interlocking responsibilities; the purpose was to prevent both majoritarian rashness and the governmental tyranny that could result from the conjoining of power in a single source. Maintaining conditions that would sustain the resulting tension between executive and legislature was to be the central constraint on any proposed structure for government.¹¹⁴

settled until the decision in *Myers*, sixty years later. See *infra* text accompanying notes 145-47, 163-65.

113. U.S. Const. art. I, § 4, cl. 2.

114. The success of the Constitution is to be measured by the richness and sweep of contemporary government's reach; by the specialization of function that has, overall, occurred; by the extent of political freedom we nonetheless enjoy; and by the continuing tensions among the three named branches over issues of political advantage.

In his recent Storrs Lectures at Yale Law School, my colleague Bruce Ackerman put the point in the following way:

[T]he separation of powers [is] a vast machine by which each constitutional official is encouraged to question the extent to which other constitutional officials are successfully representing the People's true political wishes. Thus, while each officeholder will predictably insist that *he* speaks with the *authentic* accents of the People themselves, rival representatives in other institutions will often find it in their interest to deny that the representative has indeed represented the people in a fully satisfactory way. . . . As it works itself out in practice, the system emphasizes that *no legal form can enable any*

The Constitutional Convention arose out of dissatisfaction with a government dominated by the legislature, a dissatisfaction on both practical and theoretical grounds. In practice, legislative government did not work; legislatures were fragmented and episodic in their attention to the affairs of state, diffusing and defeating responsibility.¹¹⁵ In theory, the joining of all government functions in one authority, unchecked by others, was an invitation to tyranny.¹¹⁶ Interpenetration of function and competition among the branches would protect liberty by preventing the irreversible accretion of ultimate power in any one. As Madison wrote in the *Federalist* papers, the essence lay in "giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."¹¹⁷ Madison's strategy was given form in the veto power and in Congress's authority to create the infrastructure of executive government and to exercise plenary control over the President's expenditure of funds (and thus over the size and power of the executive establishment).¹¹⁸

The imprecision inherent in the definition and separation of the three governmental powers contributes to the tensions among them and in that way serves the same beneficial and protective functions as were anticipated from the creation of checks and balances. In the long interludes between congressio-

small group in Washington, D.C. to speak unequivocally for We the People
 Instead the House and Senate and Presidency each represent the People in a manner of speaking; each is [only] a metaphor

Ackerman, *Discovering the Constitution* 1-26 to 1-27 (unpublished speaking manuscript) (emphasis in original).

115. C. Thach, *supra* note 88, at 25-75; *The Federalist* No. 48, at 310-11 (J. Madison) (C. Rossiter ed. 1961) (quoting T. Jefferson).

116. Bruff, *supra* note 47, at 467-68, quoting *The Federalist* No. 48 (J. Madison). See generally Levi, *Some Aspects of Separation of Powers*, 76 *Colum. L. Rev.* 371 (1976); E. Corwin, *supra* note 74, at 3-30; A. Sofaer, *War, Foreign Affairs, And Constitutional Power: The Origins 1-24* (1976); G. Wood, *Creation of the American Republic, 1776-1787*, at 527 (1969).

117. *The Federalist* No. 51, at 321-22 (J. Madison) (C. Rossiter ed. 1961). Madison conceded that Congress was better placed for this than the other branches; the choice of a two-part legislature was expected to generate an internal check within that body.

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights.

Id. at 322; see G. Wills, *supra* note 19, at 120.

118.

My classes think I am trying to be funny when I say that, by simple majorities, Congress could at the start of any fiscal biennium reduce the President's staff to one secretary for answering social correspondence, and that, by two-thirds majority, Congress could put the White House up at auction. But I am not trying to be funny; these things are literally true

Black, *The Working Balance of the American Political Departments*, 1 *Hastings Const. L.Q.* 13, 15 (1974).

nal sessions, the President would have to make as well as execute national policy; execution cannot be separated from interpretation, nor interpretation from the exercise (within whatever bounds might be statutorily defined) of a policy function. How sharp the definition of bounds had to be (the delegation question as we now know it) or how far removed from the President the function of executing a given law could be placed were open questions. This imprecision invites the desired political rivalries that tend to keep the two more dangerous branches in check. At the same time it permits smoother functioning on issues of agreed importance than would a more rigid structure. With room left for interaction, change and growth over time, the relative strength of President and Congress could change with the political climate, without offending the constitutional structure.

The Framers expected the branches to battle each other to acquire and to defend power. To prevent the supremacy of one branch over any other in these battles, powers were mixed; each branch was granted important power over the same area of activity. The British and Confederation experience had led the Framers to avoid regarding controversy between the branches as a conflict between good and evil or right and wrong, requiring definitive, institutionally permanent resolution. Rather, they viewed such conflict as an expression of the aggressive and perverse part of human nature that demanded outlet but had to be kept from finding lasting resolution so that liberty could be preserved.¹¹⁹

Thus, while the actual text of the Constitution says little about the structure of the federal government beneath the apex, the structure and history of the Constitution make clear the framers' decisions concerning the interdependence of the three branches and the place of the agencies as subsidiary to all three. One may see the issue of balance of power among the three named branches of government as reflecting a process not an institution, with impermanence of resolution not only inevitable but desirable as an outcome. "The constitutional convention of 1787 is supposed to have created a government of 'separated powers.' It did nothing of the sort. Rather, it created a government of separated institutions sharing powers."¹²⁰ Whether described as a "'permanent guerrilla warfare' between the executive and legislative branches," or as a "duty to act . . . coupled with a duty to act with care and comity and with a sense of the higher values we all cherish,"¹²¹ the checks and balances idea embodied in the Constitution creates and demands the continuance of a "tension among the branches, with each, at the margin, limiting the other,"¹²² so that, in Madison's terms, "'ambition [could] be made to counteract ambition.'"¹²³

119. A. Sofaer, *supra* note 116, at 60.

120. R. Neustadt, *supra* note 42, at 26.

121. Levi, *supra* note 116, at 391.

122. *Id.*

123. *Id.* at 378 (quoting *The Federalist* No. 51 (J. Madison)).

B. *Interpretations of the Constitutional Constraints*

In addition to constitutional text and context, the interpretations given the President's place in government by courts and others during the past two hundred years influence contemporary understandings of his relationship to the agencies and Congress's power to structure that relationship. Perhaps of particular importance here is the legal folklore about independent regulatory commissions, in some versions suggesting that parts of government responsible for the administration of important government programs can be put wholly beyond the President's supervisory reach. That folkloric view should seem surprising in light of the foregoing, and indeed a close look at the cases will show that that suggestion is hardly a necessary reading; the Court never had to confront so dramatic an assertion, and our understanding of its opinions can be reconstructed without much difficulty to reflect awareness of the need to maintain a tension among the named heads of government, in which all participate.

Quite different from the folklore is the proposition that Congress is free to choose between placing ultimate responsibility for decision with the President and assigning that responsibility to those to whom it has initially assigned the work of administration. Even within what is undoubtedly the sphere of executive influence—for example, the conduct of law enforcement—that proposition finds support in the Constitutional Convention's failure to adopt measures such as the Morris plan. The proposition seems undebatable where Congress can find circumstances, such as a need for objective decision, that warrant placing administration beyond the sphere of its own as well as the President's political influence. Yet note that neither choice effects or is a justification for presidential *exclusion*. However unserviceable rigid separation-of-powers arguments have become beneath the very top levels of government, the checks-and-balances idea retains force: congressional arrangements that threaten the viability of an independent, unitary executive capable of opposing the Congress's own assertions of power are, for that reason, suspect.

1. *The Early Interpretations.* — The Constitution vests all executive power in the President and, while contemplating delegation, clearly intends focused, personal responsibility for its exercise. Yet Congress could and did create responsibilities in the departments to be exercised by departmental heads, not the President. Those regimes were creatures of law, law whose faithful execution the President had as much responsibility to assure as any other; what, then, was to be his role? Attorneys general vacillated whether an appeal lay to the President from particular decisions of the secretaries, but the practice was to leave decision where the Congress placed it.¹²⁴ The difficulties were well stated in Professor Corwin's classic study of the Presidency:

124. See, e.g., 1 Op. Att'y Gen. 624 (1823) (holding that no appeal would lie); 2 Op. Att'y Gen. 480 (1831) (same); 2 Op. Att'y Gen. 507 (1932) (same); 5 Op. Att'y Gen. 630 (1852) (same); 10 Op. Att'y Gen. 527 (1863) (same); 11 Op. Att'y Gen. 14 (1864) (same); 18 Op. Att'y Gen. 31 (1884) (same); 2 Op. Att'y Gen. 463 (1831) (holding that an appeal would lie); 6 Op. Att'y Gen. 326, 343 (1854) (same); 7 Op. Att'y Gen. 453, 464 (1855) (same); 15 Op. Att'y Gen. 94, 101 (1876) (same).

Suppose . . . that the law casts a duty upon a subordinate executive agency *eo nomine*, does the President thereupon become entitled, by virtue of his "executive power" or of his duty to "take care that the laws be faithfully executed," to substitute his own judgment for that of the agency regarding the discharge of such duty? An unqualified answer to this question would invite startling results. An affirmative answer would make all questions of law enforcement questions of discretion, the discretion moreover of an independent and legally uncontrollable branch of the government. By the same token, it would render it impossible for Congress, notwithstanding its broad powers under the "necessary and proper" clause, to leave anything to the specially trained judgment of a subordinate executive official with any assurance that his discretion would not be perverted to political ends for the advantage of the administration in power. At the same time, a flatly negative answer would hold out consequences equally unwelcome. It would, as Attorney General Cushing quaintly phrased it, leave it open to Congress so to divide and transfer "the executive power" by statute as to change the government "into a parliamentary despotism like that of Venezuela or Great Britain, with a *nominal* executive chief or president, who, however, would remain without a shred of actual power."¹²⁵

The Supreme Court had indicated in *Marbury v. Madison*¹²⁶ that a court could direct the performance of a nondiscretionary duty given to the executive.¹²⁷ In 1837, in *Kendall v. United States*,¹²⁸ it seemed to go further, giving the negative answer to Professor Corwin's question—that Congress could structure government so as to preclude the President from imposing his will on a cabinet officer.

Kendall was an action in mandamus, a direction to the Postmaster General to pay a specific sum of money which Congress by special statute had ordered paid but which the President wished withheld. At the time, as *Marbury* illustrates, a writ of mandamus was available only if it could be shown that its subject had been given no discretion in the performance of the function at issue. Finding the Postmaster under a legal obligation to pay, the Court directed that mandamus issue. It would be "alarming," said the Court, to assert that

125. E. Corwin, *supra* note 74, at 80–81. For contemporary efforts, see Neustadt, *supra* note 42; E. Hargrove, *supra* note 26; and Ledewitz, *The Uncertain Power of the President to Execute the Laws*, 46 *Tenn. L. Rev.* 757 (1979).

The first Congress's differential handling of the Departments of State and War, on the one hand, and Treasury, on the other was drawn on by Freund and others to suggest a basis for distinguishing between "executive power" and "administrative power." See generally *supra* note 11. Stated as a proposition about complete congressional control, the distinction seems one example of Corwin's "flatly negative," and therefore unacceptable, answer. As a marker of differential authority, it has much more persuasive force. See *infra* note 277.

126. 5 U.S. (1 Cranch) 137 (1803).

127. See the full discussion of the case's significance for administrative law in Monaghan, *Marbury and the Administrative State*, 83 *Colum. L. Rev.* 1 (1983).

128. 37 U.S. (12 Pet.) 524 (1837).

congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the discretion of the president.¹²⁹

While this language might be understood as broadly confirming Congress's power to confer discretion on administrators beyond the President's control, the decision carefully avoided invitations to decide so large an issue.¹³⁰ Because the "duty" actually involved in the case left no scope for judgment, there was no need to decide what voice the President might have where the law offers a choice of possible courses of action—that is, where it confers discretion on the responsible administrator. The opinion holds only that the President and other executive officials must act within the law.¹³¹

Effective presidential power to control subordinates may be substantially a function of his ability to enforce his wishes, to remove persons in whom he lacks political confidence or, less broadly, who disobey his valid directives.¹³² In *Marbury*, the Court had established that for some officers of government—in this case ones we have since come to call article I judges—Congress could constrain the President's removal authority over persons he appointed and who were not constitutionally entitled to tenure.¹³³ This proposition was extended to employees in "the executive Departments" in *United States v.*

129. *Id.* at 610.

130. See the full discussion of the case, in the context of an effort to understand the President's relationship to administration, in Grundstein, *supra* note 11, at 309-19. See also Monaghan, *supra* note 127, at 14-16, 25.

131. See *Decatur v. Palding*, 39 U.S. (14 Pet.) 497 (1840). The restrictions on the effective use of mandamus are reflected in the rarity of its use during the nineteenth century as an instrument for judicial control of law-administration. See Monaghan, *supra* note 127, at 14-16; Hart & Wechsler, *supra* note 2, at 1381.

132. Presidential control has its roots in "the executive power" and the responsibility to "take care that the laws be faithfully executed," both express in the constitutional text, and not, as is often thought, in an arguable removal authority never better than implicit. While surely control is hard to effect without workable disciplinary tools in hand,

the commonly accepted explanation that the presidential control over administration is an accidental result of the possession of the power of removal [is erroneous]. The exact reverse is the true explanation. The power of removal was rather derived from the general executive power of administrative control. The latter power has not been an extra-constitutional growth. It was the conscious creation of the men who made the Constitution.

C. Thach, *supra* note 88, at 158-59.

133. 5 U.S. (1 Cranch) 137 (1803). The offices in question were for Justices of the Peace in the nation's capital, who had been given a fixed term of office. An Act Concerning the District of Columbia, ch. 15, § 11, 2 Stat. 103, 107 (1801). Like so much else in the opinion, the discussion of the validity of this restriction is dictum, which Chief Justice Taft sought valiantly to defeat in his opinion for the Court in *Myers v. United States*, 272 U.S. 52, 139-44 (1926). Nonetheless, he was careful to recognize the existence of special considerations supporting restrictions on the President's removal authority in such cases, *id.* at 135, 157-59. See the discussion in Bruff, *supra* note 47, at 476-78.

Perkins.¹³⁴ That case involved a claim for pay allegedly owed to naval engineers who appeared to have been assured of office for a term by statute, but who had been honorably discharged by the Secretary of War when he found no position available for them. The engineers prevailed when the Court concluded that fixed tenure had been granted:

We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest. . . . The head of a Department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto.¹³⁵

The constitutionality of the civil service was thus assured—and with it, recognition of a sharp limitation of the President's power over the personnel of executive government.

Finally, the early Court established that neither the separateness of Congress, Court, and President nor the primary responsibilities assigned to each precluded Congress from authorizing the performance of other sorts of ancillary power. For example, while the Constitution placed the lawmaking function in Congress and the dispute-resolving function in the judiciary, the courts could be authorized to adopt rules of procedure to govern proceedings before them.¹³⁶ Delegations to territorial and district governments were commonplace, objectionable only if they created a territorial government in which the three functions of government were indistinct;¹³⁷ these delegations could include authority for persons who were not article III judges to exercise unmistakably judicial functions.¹³⁸ And the President (or other executive officials) could validly be authorized to engage in rulemaking.¹³⁹

134. 116 U.S. 483 (1886).

135. *Id.* at 485.

136. Such power has been statutorily conferred since the beginning of the republic, Judiciary Act of 1789, ch. 20, § 17(b), 1 Stat. 73, 83; see also 1 K. Davis, *Administrative Law Treatise* 158-59 (2d. ed. 1978), and was early sustained in a noted opinion of Chief Justice Marshall, *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 15-16 (1825).

137. *Springer v. Philippine Islands*, 277 U.S. 189 (1928).

138. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855). Whether the last two cases (and their successors, e.g. *Palmore v. United States*, 411 U.S. 389 (1973)) "support a general proposition [that federal judicial power must be exercised by article III judges] and three tidy exceptions . . . or whether instead they are but landmarks on a judicial 'darkling plain' where ignorant armies have clashed by night," was the issue hotly debated by the plurality and dissenting opinions in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 91 (Rehnquist, J., concurring), discussed *infra* notes 238-56 and accompanying text. What was not debated, however, was that Congress could to a substantial extent (and in cases particularly important from a separation-of-powers and policy perspective) place judging in the hands of federal officials outside the federal judiciary defined in article III.

Crowell v. Benson, 285 U.S. 22 (1932), sustained Congress's power to assign to federal agencies initial decision of the great bulk of factual issues in what were essentially disputes

2. *The President's Removal Power and a Formal Approach to the Place of Administration.* — The accelerating growth of national government following the Civil War brought with it the civil service laws, the first of the independent regulatory commissions,¹⁴⁰ the heightened use of delegation and heightened concerns about it, and a general worrying about the relationship of the Presidency and administration. Perhaps disturbed by the consequences of relegating all this burgeoning authority to the President's political domain, and consistent with growing faith in scientific administration, leading commentators argued that "executive" and "administrative" authority were distinct—the latter belonging to professional public administrators, who could properly be placed outside the President's direction.¹⁴¹

Understanding of the relation between the Presidency and administration was shaped by two cases of the 1920's and 30's, *Myers v. United States*¹⁴² and *Humphrey's Executor v. United States*.¹⁴³ Both tested the President's claim of inherent executive authority to remove presidential appointees from office in the face of statutory limitations on removal; both appeared to use a strictly formal, separation-of-powers approach to the place of agencies in government. The seemingly opposite conclusions to which they came are usually understood in terms of that approach as denying the independent regulatory commissions any determinate place in the tripartite structure of government.¹⁴⁴ Yet their conclusions can also be understood in light of the checks-and-balances approach, and so understood the opinions are both readily reconciled and consistent with the constitutional scheme.

Myers concerned a postmaster appointed to a four-year term under a statute which for fifty years had required senatorial assent to both appointment and removal of these officials. The President sought to remove him before the expiration of his term, without obtaining senatorial concurrence.

between private parties under a federal compensation scheme, subject only to review for factual sufficiency (not correctness) and legal accuracy. See, e.g., Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv.L.Rev. 1362 (1953), reprinted in Hart & Wechsler, *supra* note 2, at 338-60. The reservation for de novo judicial determination of "jurisdictional" and "constitutional" facts has proved troublesome, see *infra* text accompanying notes 238-56, but has not obscured the more general proposition permitting assignment of essentially judicial decision outside the article III judiciary.

139. *The Brig Aurora*, 11 U.S. (7 Cranch) 382 (1813); *Field v. Clark*, 143 U.S. 649 (1892).

140. The first independent regulatory commission, the Interstate Commerce Commission, was in fact not "independent" when first created, but an element of the Department of Interior. Like so much else in American government, its evolution was the product of efforts to improve its practical workability after the lessons of experience, not the result of a new theory about the proper ordering of executive (or administrative) government; that came later. See R. Cushman, *The Independent Regulatory Commissions* (1941); W. Nelson, *The Roots of American Bureaucracy, 1830-1900* (1982).

141. See Grundstein, *supra* note 11.

142. 272 U.S. 52 (1926).

143. 295 U.S. 602 (1935).

144. See *supra* notes 15-16.

The resulting litigation was difficult and portentous; special counsel was appointed in the Supreme Court, and the cause had to be argued twice there before the Court could reach its conclusions—conclusions stated in opinions of unusual length and elaborateness. A divided Court found that reserving congressional participation in the removal of an executive officer unconstitutionally invaded the President's executive function. The Court's opinion, written by a former President, suggested that the President enjoyed an inherent authority to remove every officer of government he was empowered to appoint (other than a judge protected by article III).¹⁴⁵ It appeared to eradicate the executive/administrative distinction by establishing the President's disciplinary control as universally available.¹⁴⁶ Congress acknowledged the apparent sweep of this decision by ceasing to provide removal protections in statutes creating new government agencies.¹⁴⁷

Humphrey's Executor resulted from President Roosevelt's effort, on the authority of *Myers*, to remove a commissioner of the Federal Trade Commission before the expiration of his seven-year statutory term. Here, a statute enacted before *Myers* required specification of cause for removal, but did not require senatorial concurrence. The President suggested no "cause" for Hum-

145.

The view of Mr. Madison and his associates was that not only did the grant of executive power to the President . . . carry with it the power of removal, but the express recognition of the power of appointment . . . enforced this view on the well approved principle of constitutional and statutory construction that the power of removal of executive officers was incident to the power of appointment. It was agreed by the opponents of the bill [to establish a Department of Foreign Affairs], . . . that as a constitutional principle the power of appointment carried with it the power of removal. Roger Sherman, 1 Annals of Congress, 491. This principle as a rule of constitutional and statutory construction, then generally conceded, has been recognized ever since.

272 U.S. at 119 (citations omitted). Strikingly, Chief Justice Taft extended this view even to government officials performing as judicial substitutes.

[T]here may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affects the interests of individuals, the discharge of which the President can not in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised.

Id. at 135.

146.

The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.

Id. at 122.

147. See, e.g., Communications Act of 1934, ch. 652, 48 Stat. 1064, 1067 (current version at 47 U.S.C. § 151, 154 (1976)) (FCC); Securities Exchange Act of 1934, ch. 404 Stat. 881, 885 (current version codified at 15 U.S.C. § 78a, 78d (1983)) (SEC).

phrey's removal beyond political incompatibility—a reason plainly insufficient under the statute. This challenge arose, however, at a time when presidential rather than congressional hegemony may have seemed the more palpable threat; it was decided on the same day that the Court invalidated the National Industrial Recovery Act, once the centerpiece of the New Deal, on the ground of excessive delegation to the President.¹⁴⁸ Here, unlike *Myers*, decision appears to have been easy. Acting scant weeks after argument, the Court unanimously repudiated the *Myers* dicta and found that Congress could validly impose a “cause” requirement on the discharge of a Federal Trade Commissioner; given the circumstances, the Court did not have to say what cause could be.

Reading both opinions, one is struck by their emphasis on a radical separation of powers within government, with a concomitant need to place agencies in one or another branch, maximally free from intrusion by the others. For the *Myers* Court, “the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires.”¹⁴⁹ From placement of the Post Office Department in the executive branch and the absence of any constitutional provision for congressional participation in removal, all else followed. For the *Humphrey's Executor* Court, “[t]he fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed, and is hardly open to serious question.”¹⁵⁰ As the legislative history of the Federal Trade Commission Act established a purpose that “the commission was not to be ‘subject to anybody in the government but . . . only to the people of the United States;’ . . . ‘separate and apart from any existing department of the government—not subject to the orders of the President;’”¹⁵¹ the Court said the President could exercise no authority over its members beyond the constitutionally explicit one of appointment. Viewing both the unquestioned congressional purpose to remove the FTC from politics and the agency's particular functions, the Court described it as “an agency of the legislative or judicial department of the government,”¹⁵² exercising in those contexts only an “executive function—as distinguished from executive power in the constitutional sense.”¹⁵³

More than *Myers*, but perhaps in consequence of that decision, the reasoning of the *Humphrey's Executor* Court seems open to question. Remarkably, the Court did not pause to examine how a purpose to create a body

148. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

149. 272 U.S. at 116.

150. 295 U.S. at 629.

151. *Id.* at 625.

152. *Id.* at 628.

153. *Id.*

"subject only to the people of the United States"—that is, apparently, beyond control of the constitutionally defined branches of government—could itself be sustained under the Constitution.¹⁵⁴ Later, the opinion tells us that the agency is in *both* the legislative *and* the judicial branches, because of the functions it performs, but not how an agency can at the same moment reside in both the legislative and the judicial branches, consistent with the "fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence . . . of either of the others."¹⁵⁵ Nor does the Court explain its distinction between "executive function" and "executive power." Of course the commission was carrying out laws Congress had enacted; in that sense its functions could hardly have been characterized as other than executive, whatever procedures it employed to accomplish its ends. And, of course, the public procedures it employed were no different than those used by any cabinet department for similar purposes.¹⁵⁶

If the formal question where in government to place the agency is put aside, however, it is not hard to understand the Court's result. It described the FTC's functions as follows:

154. Cf. Ackerman, *supra* note 114. The Court's assurance about what seems a difficult question might be a product of the theoretical division between executive and administrative power (although it would be hard to locate such a division in the constitutional scheme). See Grundstein, *supra* note 11, at 287. Or perhaps it was the result of the times—not only of *Schechter*, but of growing executive totalitarianism in Europe—in which resistance to broad executive authority was only to be expected. Certainly it is noteworthy that the two (and only) successful invocations of the delegation doctrine, *Schechter* and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), each involved actions undertaken directly in the President's name under statutes that at a time of national economic emergency, may have appeared to have thrown control of the entire process of government into the President's hands. Congress appeared to have given that potent, apical actor free rein, setting no standards by which the courts could act as a brake on his decisions. (In *Ryan* one had the further, unedifying spectacle that the law the President created was private—hidden in an administrator's desk, where even the Congress might not readily know what it was.) See Jaffe, *An Essay on Delegation of Legislative Power*: II, 47 *Colum. L. Rev.* 561, 571 (1947).

155. 295 U.S. at 629. Similarly formal approaches to agency placement might also be thought to underlie the troubling aspects of the Court's near-contemporaneous judgment in *Crowell v. Benson*, 285 U.S. 22 (1932), discussed *supra* note 138. While sustaining the assignment of many "adjudicatory" questions to administrative agencies subject to judicial review, the Court there insisted on *de novo* judicial determination of so-called jurisdictional facts on which the constitutionality of applying a statute might depend, as necessary to protect the article III function. Principles that would make that reservation workable did not readily appear but—at least until apparently revived by the plurality opinion in *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), see *infra* text accompanying notes 253–56—that aspect of the decision slumbered in "deserved repose." *Estep v. United States*, 327 U.S. 114, 142 (Frankfurter, J., concurring); see also W. Gellhorn, C. Byse & P. Strauss, *supra* note 2, at 293–96.

156. While rulemaking is sometimes described as "quasi-legislative" and adjudication on the record as "quasi-judicial," see *supra* note 16, the possibility of such descriptions has not been thought to be a reason why these functions cannot constitutionally be performed in the executive. Rather, it has formed a basis for constraints on their performance: that rulemaking must be in accordance with a sufficiently defined delegation to canalize executive authority, *Schechter*

- (1) The FTC could direct cessation of unfair methods of competition in commerce, *after* full-dress adjudicatory hearings;
- (2) It could conduct investigations culminating in a report to the Congress with recommendations for legislation;¹⁵⁷ and
- (3) It could act 'as a master in chancery' in antitrust suits brought by the Attorney General and referred to it by a district court.¹⁵⁸

Assurance of impartiality and the absence of political controls of any character are centrally important to two parts of the statutory scheme as thus described; providing information-gathering service to Congress (not the President) characterizes the remainder. So far as the Court was educated to the Commission's functions, the FTC did little as to which unified policy direction was even arguably relevant.¹⁵⁹ Thus, the need to maintain tension between the named branches was not implicated. The Court was acutely conscious, however, of the extent to which the Commission acted in circumstances calling for judicial impartiality and the removal from politics that might tend to protect it.

The Solicitor General, at the bar, . . . with commendable candor, agreed that his view . . . necessitated a like view in respect of the Interstate Commerce Commission and the Court of Claims. We are thus confronted with the serious question whether . . . the judges of the legislative Court of Claims, exercising judicial power, continue in office only at the pleasure of the President.¹⁶⁰

Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring); that adjudication must be in accordance with procedures meeting constitutional tests of fairness, *Goldberg v. Kelly*, 397 U.S. 254 (1970); and that both (apparently, but never definitively) must occur within the ambit of judicial review, *id.* at 278 (Black, J., dissenting). See also *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 86 n.39 (1982); (*INS v. Chadha*, 103 S. Ct. 2764 (1983)).

157. The brief which Humphrey's executor filed with the court indicated that 50% of the FTC's budget was spent for this function. Although the Court has accepted this as a "legislative" function, *Buckley v. Valeo*, 424 U.S. 1, 13-14 (1976), see *infra* text accompanying notes 177-85, the Constitution explicitly places the function of recommending to Congress "such Measures as he shall judge necessary and expedient" in the President's hands. U.S. Const. art. II, § 3.

158. *Humphrey's Executor*, 295 U.S. at 620-21.

159. The Court noted that the President was also authorized to direct investigations, but passed over that inconvenient attachment to the executive branch as "so obviously collateral to the main design of the act as not to detract . . ." *Id.* at 628 n.1.

160. *Id.* at 629 (citation omitted). Recall the ease with which Chief Justice Marshall had upheld a similar restriction on the President's removal power over judges of certain legislative courts in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). See *supra* note 133 and accompanying text. Contrast the rigid separations apparently enforced by the *Humphrey's Executor* opinion with the unconscious ease with which the Court speaks of judges of a "legislative" court "exercising the judicial power." That puzzle would return, and defeat efforts at intellectually satisfactory explanation in separation-of-power terms, in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), sustaining the Court of Claims as an article III court.

Thus, the result can be fully explained by the apolitical character of the judgments to be reached, and the constitutional appropriateness, if not necessity,¹⁶¹ of assigning such judgments to an apolitical process.¹⁶²

Once fairness considerations are taken into account, these cases can be seen as explained by the difference between a limitation on independent and executive agencies, but between presidential power that implicates a struggle between the branches and one that does not. *Myers* can readily be limited to the issue presented by the provision for senatorial concurrence in removal, the Tenure of Office Act problem. Although the *Myers* Court talked at times as if it regarded the use of fixed terms of office and "for cause" requirements to restrict the President's removal authority as equally difficult, that equation is not convincing. Reservation of senatorial approval for removals suggests political power struggles between President and Senate that are not connoted by a judgment that fixed tenure in office, with limitations on discharge, will be useful for the ends of public policy.¹⁶³ Indeed, the Court acknowledged that certain types of executive activity could properly be placed beyond the President's directory power for reasons of public policy;¹⁶⁴ and that Congress could validly have given the Postmaster tenure protection by placing him in the civil service, rather than attempting to reserve a political authority over discharge.¹⁶⁵ Only heads of departments *must* be presidential appointees, and even for them tenure protection need raise no question of imbalance between the executive and legislative branches, of aggrandizement of Congress's political power at the expense of the President's. The issue of aggrandizement seems inevitable, however, where Congress asserts the right itself to control the removal question. It has not only limited the President's ordinary political authority by imposing a "for cause" requirement, but also greatly expanded its own political authority by insisting on a voice in that determination. The latter measure defeats any claim that the measure has an apolitical end such as assuring objectivity.

Humphrey's Executor, in turn, could be understood as having turned on precisely this distinction between those limitations on removal where Congress

161. *Kalaris v. Donovan*, 697 F.2d 376, 398-99 (D.C. Cir.), cert. denied, 103 S. Ct. 3088 (1983), upheld assignment of on-the-record adjudicatory functions to persons found subject to unexplained removal by the secretary of their department.

162. *Wiener v. United States*, 357 U.S. 349 (1958), involving the War Claims Commission, underscores the point. "[T]he nature of the function that Congress vested in the . . . Commission"—to adjudicate according to law—is "the most reliable factor for drawing an inference regarding the President's power of removal." *Id.* at 353; see also *infra* text accompanying notes 199-215; Bruff, *supra* note 47, at 499.

163. See C. Thach, *supra* note 88, at 66-67, for an account of an influential experience with this problem during the Revolutionary War.

164. The Court hinted this to be so for duties "peculiarly and specifically committed to the discretion of a particular officer . . . [or] duties of a quasi-judicial character," 272 U.S. at 135. However, the opinion goes on to assert that an unintelligent or unwise exercise of these duties *could* be the reason for an after-the-fact removal.

165. *Id.* at 161.

has retained some role and those in which it has not. Whether or not one numbers the FTC among "the executive Departments," the purpose to make it "free from 'political domination or control'"¹⁶⁶ in exercising functions for which that quality is evidently desirable establishes a justification for some tenure protection. The FTC Act imposes no congressional intrusion analogous to that presented to the Court in *Myers*; on its facts, it does not even foreclose some presidential involvement in FTC policy formation. The President had given Commissioner Humphrey no particular directive; he had asked no advice that Humphrey then refused to give; he did not, perceiving insubordination, direct him to leave. His request for Humphrey's resignation was founded in failure of trust, not breach of discipline. Consequently, the Court found only that Congress could legitimately insist that one holding the office of Federal Trade Commissioner serve on terms other than those of a personal adviser. It did not have to say whether the President could give the FTC Commissioners binding directives, or if so of what sort, or what might be the consequences of any failure of theirs to honor them.¹⁶⁷

So reading *Humphrey's Executor* would underscore that presidential claims to participate in the FTC's (and other independent agencies') policy-making have not been excluded by that opinion's apparently broad statement that "[t]he authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted . . ."¹⁶⁸ "Quasi-legislative," as that Court used the phrase, referred not to policy formation but to the exercise of investigatory authority in support of reports to the Congress. Reports to the Congress, unlike rules, have no direct impact on the relationship between citizens and their government; in them, the President's claim to participate has a different character.¹⁶⁹ The FTC of that era was not a rulemaker; it reached its policy conclusions through adjudications. The concern for "quasi-judicial" agencies reflects the Court's focus on the legislative requirement of impartiality, of freedom from *any* political direction to secure procedural fairness. *Humphrey's Executor* did not consider the question whether Congress constitutionally could create an administrative body free from the political direction of the President but subject to such direction from congressmen and their committees, and empower that agency to make law.¹⁷⁰ Congress can be conceded the power to forbid unilateral presidential removal

166. *Humphrey's Executor*, 295 U.S. at 625.

167. See E. Redford, *The President and the Regulatory Commissions* 20 (1960).

168. 295 U.S. at 629.

169. See U.S. Const. art. III, § 3. While the judgment to place "the executive Power" in the President seems and was intended to exclude its unsupervised placement in others, one is hard put to imagine a need for exclusivity in recommending legislation.

170. At the time of *Humphrey's Executor* political influence on rulemaking does not seem to have been considered a problem. In part this was because the overwhelming majority of agency business was handled through formal and informal adjudication. See Attorney General's Comm. on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 186, 76th Cong., 3d Sess. (1940) (pt. 21); S. Doc. No. 10, 77th Cong., 1st Sess. (1941) (pt. 2). In

for "no reason at all" of an FTC Commissioner regarded as principally an adjudicator, without implying that total removal of the FTC as a policymaking organ of government from presidential oversight or control would be within its power.

3. *The Checks-and-Balances Approach to the Place of Administration: Buckley v. Valeo and the Early Nixon Cases.* — Decisions about government structure stemming from the political turmoil of the Nixon Presidency suggested that the Court might be ready to abandon the pigeonholing of agencies as "executive," "legislative" or "judicial" in favor of considering the impact of particular challenged provisions respecting them on the balance of authority among the institutions defined in articles I, II and III. The view that there exist "three airtight departments" was described as "archaic,"¹⁷¹ and seemed on its way to being replaced by a checks and balances approach that, like that of the framers,¹⁷² gave central attention to "whether [an] Act disrupts the proper balance between the coordinate branches."¹⁷³ The Court thus seemed ready to turn to the central but difficult work of assessing structural arrangements in functional terms—in terms of their contribution to or detracting from the maintenance of tensions among the named branches.

addition, much of such rulemaking as was done was apolitical in nature. The Interstate Commerce Commission, for example, had issued only 20 tariff circulars through 1939 dealing with rate setting, and these concerned the form and style of the tariffs, not their content. S. Doc. No. 10, supra, at 45 (1941) (pt. 11). In general, however, political influence was accepted as appropriate in rulemaking procedures

In an ordinary trial the question is whether the facts bring the case within a rule or principle of law The issues are always of limited scope, relating to the particular circumstances or transactions, and the evidence bearing upon them can be incorporated into a record.

The situation is different in rule making or other discretionary determinations which involve, in effect, the formulation of new policies. . . . Such choices must be made in the light of facts; but the chief issues are not factual. They relate either to the proper balancing of objectives . . . or to a choice of methods to achieve given objectives

It is true that the discretion thus exercised in administrative rule making operates within statutory limits and is not unfettered. Nevertheless, within these limits the important questions always are what is desirable or what is workable in order to carry out the directives contained in the statute.

Attorney General's Comm. on Administrative Procedure, Final Report: Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess. 117 (1941).

171. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977) (quoting the U.S. District Court for the District of Columbia, 408 F.Supp. 321, 342 (1976)). See also L. Jaffe, supra note 2, at 28-30; W. Wilson, *Constitutional Government in the United States* (1908); Cox, *Executive Privilege*, 122 U. Pa. L. Rev. 1383, 1387-91 (1974); Ratner, *Executive Privilege, Self Incrimination, and the Separation of Powers Illusion*, 22 UCLA L. Rev. 92, at 92-93 (1974); Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, *Law & Contemp. Probs.*, Spring 1976, at 102.

172. Recall that for Madison the central issue was "giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the other," supra text accompanying note 117.

173. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977).

One example of this approach is *United States v. Nixon*,¹⁷⁴ President Nixon's failing effort to resist the subpoena that made inevitable his resignation. The opinion has language that invokes the rigid separation-of-powers analysis: addressing the lawfulness of its own claim to assess the President's assertion of executive privilege in the case, the Court reasoned that "the 'judicial Power of the United States' vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto."¹⁷⁵ Once the Court has asserted its entitlement to pass on the claim of privilege, however, its analysis turns on "checks and balances"; the test becomes one of balance among competing legitimate claims, of possibly threatened interference with core function:

[T]he Framers . . . sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence. . . . To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim . . . would upset the constitutional balance of 'a workable government' and gravely impair the role of the courts under Art. III. . . . [I]t is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch. . . . The President's broad interest in confidentiality of communications [while constitutionally based,] will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.¹⁷⁶

This checks-and-balances inquiry—a comparison of impacts on "essential functions"—is both diffuse and subject to conscious or unconscious manipulation; it is at the same time at the heart of the framers' formula.

This more functional inquiry assumed particular importance in *Buckley v. Valeo*,¹⁷⁷ a case concerning the necessary character of presidential and congressional relationships to an administrative agency. *Buckley* presented a series of challenges to the Federal Election Act and to the Federal Election Commission (the Commission) the Act created and empowered; significant for our purposes was a separation-of-powers challenge to a provision for direct legislative appointment of some members of the Commission. The Commission was authorized, inter alia, both to conduct investigations—the quasi-legislative activity considered in *Humphrey's Executor*—and to engage in rulemaking, the quasi-legislative activity which had not been at issue in that case. Were the FEC only empowered to conduct investigations, the Court

174. 418 U.S. 683 (1974).

175. *Id.* at 704. As a proposition that the three named actors of the Constitution must remain distinct the observation is unexceptionable; at that moment, however, the Court did not have to rationalize the phenomenon of article I courts. See *infra* text accompanying notes 238–56 (discussing *Northern Pipeline*).

176. 418 U.S. at 707–13.

177. 424 U.S. 1 (1976).

reasoned, the appointment provisions would not have been objectionable; such powers are "in the same general category as . . . Congress might delegate to one of its own committees."¹⁷⁸ But rulemaking "represents the performance of a significant governmental duty exercised pursuant to a public law,"¹⁷⁹ and is *therefore* to be exercised only by officers of the United States—by persons subject to appointment by the President (with or without senatorial assent) or by a head of one of "the executive Departments."

Buckley is not always clear how it is regarding the mass of government outside the legislative branch. At some points, the opinion speaks confidently of the "three essential branches of Government"¹⁸⁰ among which all powers are distributed, and writes of functions in "the administration and enforcement of public law"¹⁸¹ as if it were describing activities of one—the executive—of those three branches. At other points it seems somewhat more hesitant about the independent regulatory commissions, as when it refers to "Heads of Departments" . . . [which] are themselves in the Executive Branch or at least have some connection with that branch."¹⁸² All that was necessary, after all, was to decide that Congress could not vest in itself appointment power for the head of an agency that would be exercising a "significant governmental duty . . . pursuant to a public law." Just as the Court in *Humphrey's Executor* seems to have thought it enough for its purposes to show that the FTC's functions were *not* executive to place the FTC beyond the President's removal claim, the *Buckley* Court may have found it sufficient to characterize the FEC's functions as "not legislative" to remove it from Congress's appointments claim.

When one is playing a shell game, however, it is important to maintain the observer's confidence that one of the shells does contain the pea, even if it is not the shell currently under examination. By characterizing as a function having to be exercised outside the legislature just that quasi-legislative activity (rulemaking) that previously had been described with some uniformity as the result of a delegation of *legislative* power, the Court destroyed that illusion, breaking through any separation-of-powers notion that the powers of government generally could be neatly parcelled into three uniquely empowered entities. The Court insisted that the central issue was to be the character of the relationships between that agency and the named heads of government, and not the formal structure of the agency in question.¹⁸³ Those conclusions could

178. *Id.* at 137.

179. *Id.* at 141.

180. *Id.* at 121.

181. *Id.* at 139.

182. *Id.* at 127; see also *id.* at 141 (functions "of kinds usually performed by independent regulatory agencies or by some department in the Executive Branch").

183. *Id.* at 124-43. The Court indicated that it was looking to the fundamental values of the Constitution in determining the effect of the appointments clause. It noted that the system of presidential nomination with senatorial confirmation was the final product of long deliberation on how to avoid granting any one branch excessive power over nominations. *Id.* at 127-31. It then found use of this system required whenever the test just quoted in the text was satisfied—as, of course, it was for the FEC. *Id.* at 131-43.

be reached without having to "put" the FEC anywhere; the claim to that power and relationship does not depend on where the agency "is," so much as the necessity of maintaining the desired sharing of authority among the named actors of the Constitution. In this way, the *Buckley* Court's reasoning stands the *Humphrey's Executor* distinction between executive function and executive powers on its head, repudiating the dicta about "independence."¹⁸⁴ Precisely because they exercise a substantial function in "the administration and enforcement of public law, those agencies are to be numbered among the Departments" so fleetingly and inconclusively referred to in article II. *Buckley* thus seems to have eliminated any sense that the independent regulatory agencies were somehow to be regarded as having a place in the structure of government fundamentally different from that of executive agencies.¹⁸⁵

These themes also appear in the next separation-of-powers case, *Nixon v. Administrator of General Services*,¹⁸⁶ which involved challenges on separation-of-powers grounds to the responsibilities Congress had imposed on the General Services Administration for processing former President Nixon's papers. Again the Court appeared to rely to some extent on the placement of the GSA in the Executive Branch in assessing the challenged arrangements.¹⁸⁷ Its central inquiry, however, seemed independent of location as such:

[I]n determining whether [an] Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions . . . [and] whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.¹⁸⁸

Vigorous dissents by the Chief Justice and Justice Rehnquist sought to distinguish between what Congress might provide respecting the papers of the President himself, and what it might require of a "legislatively created [Executive] department." Yet the majority's general analytic proposition necessarily rested—as Justice Powell made express in a concurrence¹⁸⁹—on an assessment of the extent to which the President could claim, solely because the GSA was an executive agency, power to control policy outcomes and represent his views

184. Others have also suggested the problems with *Humphrey's Executor*. See, e.g., Bruff, *supra* note 47, at 478–83; Nathanson, *supra* note 30, at 1099–109; Verkuil, *supra* note 55, at 953–55.

185. This implication of the *Buckley* Court's reasoning, that "independent" agencies are within reach of the President's "executive power," was given warranted emphasis by the D.C. Circuit in its recent opinion disapproving Congress' legislative veto of a FERC rule. *Consumer Energy Council of Am. v. Federal Energy Regulatory Comm'n*, 673 F.2d 425, 472 (D.C. Cir. 1982), *aff'd mem.*, 103 S. Ct. 3556 (1983).

186. 433 U.S. 425 (1977).

187. *Id.* at 441.

188. *Id.* at 443.

189. 433 U.S. at 500, 503–04 (Powell, J., concurring).

in any particular dispute over privilege before the courts. The Court found the GSA's placement unimportant and denied the President that power which would have given him too much unconstrained power to thwart Congress.

The checks-and-balances concerns with relationship and effective functioning thus suggested seem to be paralleled by analytic developments in other contexts in which the structural constraints of the Constitution are the central issue. Debate over the tenth amendment, for example, revived by *National League of Cities v. Usery*,¹⁹⁰ resolved into near unanimity in formulating the relevant inquiry (if not its application): whether a challenged measure threatens the integrity of the states in the constitutional scheme.¹⁹¹ Allocation of authority between state and nation, like that between executive and legislature, can be understood as a means of protecting individuals from overwhelming governmental power; deciding what is required to preserve that protection for citizens has characterized the recent judicial debates more than a cataloguing of activities inherently for the states qua states. The same may also be suggested for the public debate—not yet captured in litigation—whether the Constitution constrains Congress's authority to make exceptions to the appellate jurisdiction of the Supreme Court. What would "prevent the [Judicial] Branch from accomplishing its constitutionally assigned functions"¹⁹² is widely accepted as the appropriate inquiry to be made.¹⁹³

Inquiry along these lines has substantial advantages. It permits the judiciary to recognize the inescapable merger of some governmental functions, and permits it, as well, to tolerate periodic changes in relative political effectiveness as between President and Congress, Congress and Court, Nation and States. Our political history has been characterized by the emergence of first one and then the other as the more forceful national political presence; even if it were desirable, it seems unlikely that courts could sustain the constant intervention that would be required to maintain a fixed relationship.¹⁹⁴ Rigid molds are more easily broken; permitting growth and change makes more likely the enduring of the essential form.

Indeed, the questions formulated on this approach make largely irrelevant to constitutional analysis where a given government function—or the

190. 426 U.S. 833 (1976).

191. See, e.g., *EEOC v. Wyoming*, 103 S. Ct. 1054 (1983); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981).

192. See *supra* text accompanying note 187.

193. Hart, *supra* note 132, at 1365, reprinted in Hart & Wechsler, *supra* note 2, at 33. But cf. Wechsler, *The Courts, and the Constitution*, 65 Colum. L. Rev. 1001, 1005 (1965):

I see no basis for this view [prohibiting alteration of appellate jurisdiction motivated by hostility to decisions of the Court] and think it antithetical to the plan of the Constitution for the courts—which was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power.

194. This insight appears to underlie Professor Choper's recent argument that the question of allocating authority between President and Congress should be left entirely to their political

bureaucracy as a whole—is placed on the governmental organizational chart. Whether “in” or “out” of the constitutional executive branch, a given agency will nonetheless have a relationship with that branch requiring the questions of “proper balance,” disruption of executive branch function, and “overriding need” to be assessed.¹⁹⁵ Whether or not the Securities and Exchange Commission is “in” the executive branch, it is within reach of the President’s article II powers to execute the laws, insofar as it executes the laws; and it may also be within reach of his article I veto authority to the extent that it exercises a genuinely legislative function. This approach, it may be noted, fits the Department of Agriculture as easily as it does the SEC. Both are hybrids in the functions they perform, legislating and adjudicating as well as executing.¹⁹⁶ Neither is within the ambit of any special executive role the President may enjoy in military and foreign affairs¹⁹⁷ and both are charged by Congress with responsibility for discrete legislatively defined tasks, in which the President’s right to participate is questionable¹⁹⁸ and subject, at least, to some forms of legislative constraint.

processes, and regarded as nonjusticiable by the courts. See J. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* 260–379 (1980). Professor Choper believes that President and Congress each have sufficient controls over the other’s actions, and as each is sufficiently under the control of the electorate, that judicial correction of “mistakes” is unnecessary; and, further, since any effort to contain the two branches by judicial pronouncement would expose the courts to retaliation by a far more powerful branch, such intervention is also unwise—a wasting of the Court’s limited political capital. He points out that judicial resolution of questions such as delegation and removal authority have been at best highly limited successes that would not be missed.

Adoption of Professor Choper’s proposal would require, at the least, a substantial departure from existing “political question” law, and a further dilution of the duty to decide which many regard as an essential element of judicial review. Choper’s point does not appear to be (and hardly could be) that the Constitution embodies a commitment of any questions respecting the distribution of authority between President and Congress to those two branches; that would permit, at least in theory, complete obliteration of the distinction between the two. Doubtless it is true, as he suggests, that electoral forces would inhibit sudden, massive changes, although in times of emergency even that may not be true. More significant may be the accretion of authority or practice in one or the other branch, to the point where intended capacity to function, independently and as a check on the other branch, is substantially impaired. Put in that perspective, which seems to be the perspective of the recent cases, it seems possible to preserve both substantial room for political byplay as between President and Congress, and a decisional role for the courts. See also Monaghan, *Book Review*, 94 *Harv. L. Rev.* 296 (1980).

195. “[T]he Constitution requires that executive functions be performed under direction of the President. . . . Any other rule permits the crippling of the President’s executive power and loads the quasi-judicial independent bodies with constitutional contraband.” R. Cushman, *supra* note 140, at 459.

196. See generally *supra* text accompanying notes 47–64.

197. See *supra* note 11.

198. President Nixon’s attempt to direct tax investigations for political ends was regarded as grounds for impeachment, H.R. Rep. No. 1305, 93d Cong., 2d Sess. 141–45 (1974); his interference with antitrust actions against ITT was also open to question. Both the Treasury and the Department of Justice are cabinet departments, and the President’s instructions concerned investigation and prosecution, quintessential executive responsibilities.

C. Separation of Functions and Considerations of Individual Fairness

Much of the force apparently attached to the issue of "place" in the cases separating the President from the agencies has its source in considerations of fairness— notions more readily ascribed to the idea of separation of *functions* than separation of *powers*. Separation of powers, as a theoretical concern, has to do with the general tendency of certain governmental structures to result in (or prevent) tyrannical government—that is, a government no longer under the control of the people. Separation of functions suggests a much more atomistic inquiry, asking what combinations of functions or impacts of external influence will interfere with fair resolution of a particular proceeding. Recall the horror expressed by the *Humphrey's Executor* Court at the idea that a judge of the "legislative" Court of Claims might be subject to presidential discipline in "exercising judicial power."¹⁹⁹ That the Court accepted her sitting on a *legislative* court suggests that the issue for the Court was not (or not only) one of place but one of function. Wherever she is located in government, a judge ought not to be connected with the controversy or the parties, ought not to be interested in the outcome, must learn from the parties only what they convey in the presence of each other, and—above all—ought not to be called upon to explain her decision in the political forum. External or political intervention in on-the-record decisionmaking would be regarded as inappropriate, whether done by the President or any other political figure (e.g., a legislator),²⁰⁰ whether in an independent regulatory commission or in a traditional executive department. These are judgments we reach wholly without regard to the balance of advantage between Congress and the White House in overseeing the day-to-day functioning of political government. Within agencies themselves, executive *and* independent, these judgments are reflected in the creation of officials (administrative law judges, appeal bodies, judicial officers) remarkably free of organizational responsibilities or political supervision, who perform on-the-record judging functions.²⁰¹

This separation-of-functions rationale provides, in effect, a politically neutral basis for supporting congressional judgments about governmental structure that might otherwise appear to threaten presidential function.²⁰²

199. See *supra* notes 145-48 and accompanying text.

200. *Humphrey's Executor v. United States*, 295 U.S. 602, 629-30 (1935); *Pillsbury Co. v. FTC*, 354 F.2d 952, 964 (5th Cir. 1966).

201. See W. Gellhorn, C. Byse & P. Strauss, *supra* note 2, at 752-59.

202. Other neutral bases could be imagined. For example, it has long been argued that the conduct of monetary policy, although not carried out using formal procedures, must be free of the suspicion of political influence. See, e.g., the arguments of Alexander Hamilton for a national bank in his Report to the House on a National Bank of December 13, 1790, recounted in G. Gunther, *Constitutional Law—Cases And Materials* 105 (10th ed. 1980). While bankers are not by reputation evenly distributed between the two major parties or free of political interests, that judgment is nonetheless one which if congressionally made may be entitled to respect. Similarly, a few rulemakings are required to be conducted following trial-type procedures, and others are thought to be special because although in form rulemakings they produce trial-like results—allocating valuable rights among a limited number of specially interested participants. *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

Legislative judgments that certain types of decision are preferably made in the absence of *any* political intervention tend to defeat arguments that statutory provisions for agency independence reflect the outcome of competition between Congress and President for political dominance. Acquiescing in such judgments has no strong implications for the allocation of authority between the political branches, and raises few threats to the scheme of checks and balances. The very judgment made requires that the relationship between Congress and the agency be affected equally with that between the President and the agency; where these considerations come into play, it would be inappropriate for either to intervene unless as a party.²⁰³ The President has no regular apparatus for coordination or control over adjudication corresponding to the OMB's role in rulemaking; congressional representatives generally do not employ their oversight techniques in efforts to influence agency adjudication. Statutes sharply restrain permitted contacts in on-the-record proceedings, within and without the agency,²⁰⁴ and the courts appear sensitive to the possibility that the detachment and objectivity requisite to on-the-record decision—separation of functions as distinct from separation of powers—may have been compromised when such contacts occur.²⁰⁵ No distinction is made, either in law or in practice, between independent and executive agencies in this respect.²⁰⁶

By contrast, other agency functions are regarded as appropriate for less formal decision and for political oversight—again, whether performed in executive or independent agencies. Processes of policy formation undertaken within an existing legislative framework, in general, and informal rulemaking, in particular, are examples. These proceedings are not subject to statutory constraints on outside contacts or record formation and are not expected to occur with the antiseptic impartiality of on-the-record trials.²⁰⁷ Save for a few

203. Note that the argument here is premised on a congressional judgment having been reached about what fairness to participants may require. Although regularly enforcing on-the-record constraints, the courts have not *required* that agency adjudicators be placed beyond the possibility of political supervision. See, e.g., *Marcello v. Bonds*, 349 U.S. 302, 311 (1955); *Kalaris v. Donovan*, 697 F.2d 376 (D.C. Cir.), cert. denied, 103 S. Ct. 3088 (1983).

204. 5 U.S.C. §§ 554(d), 556(b), (d), 557(d)(1) (1982).

205. *American Public Gas Ass'n v. Federal Power Comm'n*, 567 F.2d 1016, 1068-70 (D.C. Cir. 1977), cert. denied, 435 U.S. 907 (1978); *Pillsbury Co. v. FTC*, 354 F.2d 952, 963-64 (5th Cir. 1966).

206. See 5 U.S.C. § 551(1) (1982); cases cited *supra* note 205.

207. See, e.g., *Sierra Club v. Costle*, 657 F.2d 298, 400-01 (D.C. Cir. 1981). Nathanson noted that

In the ordinary rulemaking proceedings the parties are not identified in advance. Neither are conflicting interests established in advance among those subject to the proposed regulation In such a situation the very concept of *ex parte* communications is strikingly out of place; there are no parties to begin with, and it is not known what parties will develop and what their conflicting interests will be.

Nathanson, Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings, 30 Ad. L. Rev. 377, 396 (1978). See generally Strauss, *supra* note 19, at 1036; Verkuil, *supra* note 55, at 975-76.

exceptional cases, agency rules are made following highly informal procedures not required to be on the record, and are characterized by frequent consultation within and without the acting agency.²⁰⁸ Few statutes to date, and no constitutional norm, inhibit agency officials from discussing their rulemaking decisions with staff, or even having staff participate in development and presentation of rulemaking proposals; few require such discussions to be noted or recorded.²⁰⁹ Similarly, the procedures for testing decisionmaker objectivity in adjudicatory settings are generally inapplicable in rulemaking; the rulemaker may be strongly driven by a political agenda, and reviewing courts ask only whether his mind was "unalterably closed" to persuasion on factual issues.²¹⁰ Legislators and executive officials who would not bring judges before them to explain past decisions or to be pressured respecting future ones feel and are free to engage in contemporaneous questioning of agency policymaking and to attempt to influence it.²¹¹ Perhaps the outcomes would be affected by demonstrations of political coercion, the use of legally irrelevant factors, or the use of interagency consultation to provide a conduit for the submission of private material out of public view.²¹² In general, however, the courts, like the legislature, have thus far accepted the more informal and political character of rulemaking as appropriate.²¹³

This is not to say that the issue of political participation in informal rulemaking is uncontroversial from a procedural perspective. The tempo of public debate over these issues has notably increased in recent years. Legisla-

208. Varying degrees of formality have been introduced for particular agencies in recent years through the legislative development of hybrid rulemaking procedures, more elaborate than the norm in informal rulemaking though not as formal as on-the-record rulemaking would be. See generally W. Gellhorn, C. Byse & P. Strauss, *supra* note 2, at 191-210.

209. But cf. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (codified as amended at 15 U.S.C. §§ 45, 46, 50, 57(a), 57(b)(1)-(4), 57(c), 58 (1982); Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified at 5 U.S.C. §§ 551, 552, 552b, 556, 557; 5 U.S.C. app. I § 10 (1982); 39 U.S.C. § 410 (1976 & Supp. V. 1981)).

210. *Association of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979), cert. denied, 4477 U.S. 921 (1980).

211. See *Sierra Club v. Costle*, 657 F.2d 298, 404-10 (D.C. Cir. 1981); Weingast & Moran, *supra* note 72, at 791-92.

If there is any difference to be observed in this respect as between independent and executive branch policymakers it is that congressmen, feeling perhaps more proprietary towards the independents, feel freer to intervene in their affairs. See *supra* text accompanying note 75. Thus, powerful committees may insist on early notice of proposed rulemaking, or ask that an agency await congressional consideration of an issue before precipitously making rules. See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 52 n.112 (D.C. Cir. 1977).

If there is a difference between congressmen and the President, it is that no constitutional authority directly supports the congressman's claim to suggest to the agency or department how it should interpret or apply existing law. See the discussion of *Sierra Club v. Costle*, *infra* text accompanying notes 360-70.

212. See *Sierra Club v. Costle*, 657 F.2d 298, 405 n.520 (D.C. Cir. 1981); *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972).

213. See generally *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981); *Association of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979), cert. denied, 4477 U.S. 921 (1980).

tive changes in the direction of greater formality in the decision process have repeatedly been proposed and received broad support.²¹⁴ More elaborate exposure of the basis on which decision is reached, and explanation of the agency's reasoning process, are common ground in otherwise controversial statutory proposals for reform of rulemaking procedures.²¹⁵ But these proposals are made, as they should be, without significant regard for the character of the agency involved as independent or not. It is, in other words, important what questions are asked. "To what branch does rulemaking belong from a structural perspective?" suggests one sort of answer; and that seems often to have been the way questions have been put. "What claims do the constitutionally designated institutions have to participate?" and "What arrangements best protect the appropriate procedural claims of individual participants in agency proceedings?" suggest different sets of issues, ones that seem better matched to the procedures of government as it now functions and to the considerations that govern Congress's decisions about its shape.

D. Conflict Between the Models or a Return to Formalism? The Work of the Past Two Terms

The preceding pages should suggest that of the three approaches commonly used to describe our government's structure,²¹⁶ the checks-and-balances model, understood in light of the fairness aspirations of the separation-of-functions principle, best describes the complexity of contemporary government in terms that permit adherence, as well, to the framers' vision. The seeming bright-line simplicity of separation of powers, never in fact fully embraced by those who wrote the Constitution,²¹⁷ is neither necessary as a matter of text, context or past interpretation for those parts of government not named in the Constitution itself, nor possibly successful in describing that bulk of government as it is. Courts have been able to reconcile the reality of modern administrative government and the strict separation-of-powers model, as in *Humphrey's Executor*, only by blind feats of definition—internally inconsistent while at the same time effectively negating the ability of a unitary, competent President to serve as an essential check against legislative hegemony.

Yet an analysis framed in terms of the interference with the capacity to maintain one's core function" is more effective as a means of organizing debate than as a rule for deciding cases.²¹⁸ It leaves more room for judicial

214. For discussion of the various reform proposals introduced in recent years, see Strauss, *Regulatory Reform in a Time of Transition*, 15 *Suffolk U.L. Rev.* 903, 911-12, 920-26 (1981).

215. *Id.*

216. See *supra* text following note 14.

217. See *supra* notes 114-23 and accompanying text.

218. For similar debate despite apparent agreement on verbal formulae, see *EEOC v. Wyoming*, 103 S. Ct. 1054 (1983) (tenth amendment issues); see also the dissent of the Chief Justice in *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 504, 511-13 (1977) (Burger, C.J., dissenting).

fact-finding and the operation of judicial discretion than "bright-line" formulae such as those employed in *Humphrey's Executor* appear to. To one who takes from constitutional history, above all, a sense that the framers both intended effective government and placed our protection from overwhelming government in continuing struggle among its parts rather than rigid demarcation of function, that is not troublesome. However, the bright line has its allure for justices faced with the responsibility to decide particular cases in ways that will guide the future conduct of others, future justices included.²¹⁹ The most recent outcropping of separation-of-powers cases to reach the Court suggest the justices may be responding, once again, to certainty's siren call. Three decisions of the Supreme Court's past two Terms,²²⁰ each the product of a sharply divided Court, suggest both the difficulties a court may encounter with a strict separation-of-powers analysis that turns on structural propositions about our frame of government and the advantages of the checks-and-balances analysis that turns on the interrelationships of government.

1. *Nixon v. Fitzgerald and Harlow v. Fitzgerald*. — *Nixon v. Fitzgerald*²²¹ is another heritage of the Nixon years, the outgrowth in this instance of the strongly vindictive treatment alleged to have been accorded a civil servant who had "blown the whistle" on a major defense contractor. Fitzgerald sued the former President, his personal staff aides, and departmental officials for damages; the defendants asserted that their acts had been privileged. For all but the President, eight justices held in a companion case (conforming with existing precedent) that the defendants—including cabinet members and presidential aides at the highest level—enjoyed only a qualified privilege.²²² As for the President, however, five justices concluded that, at least absent a contrary statute, he enjoys an absolute immunity from civil liability for acts performed in office, by virtue of office.²²³ Four dissenters would have found the outcome no different for the President than for any other officer of government.

The cases have two implications for this essay. First, they indicate an awareness by the Court of the centrality of personal immunity to the President's ability to perform his functions without the fear—a fear from which Congress and the courts are also protected—that the parties hurt by his policy decisions can recover damages from him. Second, the willingness of four justices to limit personal immunity for the President in a way they would not

219. See Deutsch, *Precedent and Adjudication*, 83 Yale L.J. 1553 (1974).

For an interesting discussion, majority and dissent, of the new virtues and vices of overthrowing an established "bright line" test in favor of a more contemporary balancing approach in the dormant commerce clause/preemption context, see *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Comm'n*, 51 U.S.L.W. 4539 (U.S. May 16, 1983).

220. *INS v. Chadha*, 103 S. Ct. 2764 (1983); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

221. 457 U.S. 731 (1982).

222. *Harlow v. Fitzgerald*, 457 U.S. 800, 819-20 (1982).

223. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). Justice Powell wrote for himself, the Chief Justice, and Justices Rehnquist, Stevens and O'Connor.

consider for the Congress or themselves, reflects an apparent failure of the functional analysis undertaken in *Buckley*—a failure underscored by the Court's refusal in the companion *Harlow* case to accord similar protection to the President's personal aides.

Although constitutional considerations plainly guided the Court's policy choice, its decision was not in a strict sense one of constitutional law. It is hard to discern to what extent the constitutional prerogatives of the Presidency join with what the majority regarded as the functional requirements of being the sole chief executive to support the conclusion that absolute immunity is appropriate.²²⁴ As in previous cases in which the Court had considered the immunities of prosecutors and judges,²²⁵ the privilege question was presented in a common law setting—that is, as a matter requiring judicial resolution in the absence of a dispositive statute—and the Court professed openness to the possibility that different factual judgments might be reached by legislators.²²⁶ The majority relied heavily on its reading of constitutional history for the proposition that the President's "unique position in the constitutional scheme"²²⁷ warrants a judicial determination of freedom from liability for damages. The opinion describes the immunity it finds as "a functionally mandated incident" of that position,²²⁸ "rooted in the the separation of powers under the Constitution,"²²⁹ and supported its finding by judicial reasoning of a familiar sort demonstrating all the destructive implications of the President's being subject even to the possibility of civil suit.

The majority's guesses about the impact of possible civil liability on the President's ability to function are merely that; the four dissenters strongly disagree about that impact as well as the reading of constitutional history.²³⁰

224. 457 U.S. at 749-54. The Chief Justice, concurring, sought to "underscore that the Presidential immunity derives from and is mandated by the constitutional doctrine of separation of powers," *id.* at 758, but his disagreement with his colleagues in *Harlow*, see *infra* text accompanying notes 232-35, strongly suggests that that was a personal view.

225. See *Butz v. Economou*, 438 U.S. 478, 508-514 (1978); *infra* note 228.

226. *Nixon v. Fitzgerald*, 457 U.S. at 748 n.27.

227. *Id.* at 749.

228. *I.I.* Both the majority and dissent use "functional" in two senses, without noting the difference. The first use, as here, refers to a mode of analysis like that suggested in this Article: absolute immunity derives from the need to maintain the President's function as an effective unitary executive able to balance the power of Congress. The second use refers to immunity conditioned on the type of work an official is performing: prosecutorial functions require absolute immunity, and other executive functions do not. See, e.g., *id.* at 755-57, 785. The latter, function-by-function approach is not strongly related to the structural concerns of the analysis undertaken here.

229. *Id.* at 753 (quoting *United States v. Nixon*, 418 U.S. 683, 708 (1974)).

230. From the constitutional perspective it is hard to give more than rhetorical credence to Justice White's assertion in dissent that the majority had placed the President above the law. 457 U.S. at 780. The Court has done the same for itself in its interpretation of judicial privilege, and the speech and debate clause accomplishes much the same for elected congressional officials; it would be remarkable if equivalent protection was not available for the other named principal of the Constitution. One lower court has noted this difference in treatment of the President and of legislators and judges. See Senate Select Comm. on Presidential Campaign Activities v. Nixon,

The differences do not appear to have been methodological; all the justices appear to have agreed that any immunity must be justified on functional grounds and that the appropriate criterion is the prospect of significant interference with official function.²³¹ The disagreement, instead, turned on the impact of this potential liability. The very fact of this disagreement over an issue of social fact, one well suited to legislative judgment, may well explain the majority's reservation of the case in which Congress has passed a statute explicitly creating the possibility of civil liability.²³² Whatever the resolution of the issue, the focus by all the justices on the impact of immunity on the ability of the President to carry out his job as unitary executive and counterweight to Congress was correct. At the same time, the sharp division on the impact question illustrates the difficulty of reaching judgments premised on considerations of constitutional structure and an assessment of impact on function.

To the extent that constitutional reasoning figures in the *Nixon v. Fitzgerald* result, it is reasoning that sharply distinguishes the President from the entire remainder of executive government.²³³ The companion case, *Harlow v. Fitzgerald*,²³⁴ held that senior presidential aides, White House officials who are the President's most intimate and responsible associates in performing the functions of his office, cannot make the same claims to quasi-constitutional protection as may the President. Like cabinet officials, they are entitled only to a qualified privilege that could be overcome by showing that they knew or should have known that the action would be tortious.

The undifferentiated extension of absolute 'derivative' immunity to the President's aides therefore could not be reconciled with the

498 F.2d 725, 729-30 (D.C. Cir. 1974) (qualified privilege shielding president from subpoena). Defeat at the polls, impeachment, and the liability of subordinates who inevitably will have to do the dirty work remain available remedies. To be sure, the Court has asserted that it is "not because of their particular location within the Government but because of the special nature of their responsibilities" that judicial and prosecutorial officials enjoy absolute immunity. *Butz v. Economou*, 438 U.S. 478, 511 (1978). For this reason, the Court extended the immunity to judges in administrative agencies as well as to article III courts, to prosecutors in the independent SEC as well as to those in the Department of Justice. Nonetheless, no article III judge (or his state equivalent) lacks the privilege even for conduct only arguably judicial, see *Stump v. Sparkman*, 435 U.S. 349 (1978), and in this sense absolute privilege is at least hinted to be part of the constitutional structure.

231. See 457 U.S. at 755-57 (majority); *id.* at 785 (dissent).

232. Another possible reason for leaving open the question of statutory reconsideration may lie in judicial recognition that the like assessment of immunity for judges and prosecutors could be taken as an indication of its vulnerability to self-interest. Whether persons acting as judges or prosecutors enjoy an absolute privilege had been decided on the basis of the justices' necessarily intuitive (and self-interested) judgments about the special nature of judicial and prosecutorial responsibilities, together with the opportunities for correction of error that exist in the litigation context. See *Butz v. Economou*, 438 U.S. 478, 508-14 (1978); *Stump v. Sparkman*, 435 U.S. 349 (1978).

233. 457 U.S. at 749-53 & n.31. The case in this respect adopts what had been a dissenting perspective offered by the Chief Justice in *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977). See *supra* text accompanying notes 186-89.

234. 457 U.S. 800 (1982).

*'functional' approach that has characterized the immunity decisions of this Court Our decision today in Nixon v. Fitzgerald . . . in no way abrogates this general rule. As we explained in that opinion, the recognition of absolute immunity for all of a President's acts in office derives in principal part from factors unique to his constitutional responsibilities and station. Suits against other officials—including Presidential aides—generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself.*²³⁵

The Chief Justice, dissenting, would have extended the President's privilege to his personal aides, who like the legislative aides in *Gravel v. United States*²³⁶ (or law clerks whose immunity is yet untested), are but "alter egos" to their bosses.²³⁷ For the other justices, however, separation of powers as a constitutional matter concerns the President, not the presidential office or agencies performing the daily work of government. Their reasoning can be criticized for its failure to accept for the President, as they had for Congress and themselves, a realistic need for trusted personal aides to carry out his job as a unifying force and a counterweight to Congress. Yet the result also underscores the Constitution's silence about the structure of the agencies, and the possibility of treating them as lying outside its explicit structures although subject to the control of all three named bodies.

2. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* — *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*²³⁸ demonstrates the difficulty of applying a strict separation-of-powers analysis to governmental bodies other than the three named actors of the Constitution, and suggests the greater utility of the checks-and-balances model. The case arose out of a provision in the amended bankruptcy act creating bankruptcy judges outside of article III (although subject to review by article III courts). These judges were given a range of powers closely resembling those of article III judges and authorized to decide all matters in the bankruptcy proceedings—including issues in litigation between private parties that would ordinarily be resolved in state courts (for example, the existence of a contractual obligation), but that might be swept into the bankruptcy proceedings. Their

235. *Id.* at 811 & n.17.

236. 408 U.S. 606 (1972).

237. The Chief Justice argued that the lack of absolute immunity for cabinet officials need not imply the same lack for personal aides:

[The dissent in *Nixon v. Fitzgerald*] suggests that a President and his cabinet officers, who serve only "during the pleasure of the President," are on the same plane constitutionally. It wholly fails to distinguish the role of a President or his "elbow aides" from the role of Cabinet officers, who are department heads rather than "alter egos." It would be in no sense inconsistent to hold that a President's personal aides have greater immunity than cabinet officers.

457 U.S. at 828 (Burger, C.J., dissenting); see also *Senate Select Comm. v. Nixon*, 498 F.2d 725, 729 (D.C. Cir. 1974).

238. 458 U.S. 50 (1982).

judgments would become final if unchallenged, but were subject to review, ultimately by article III courts. One question for the Court was whether the Constitution requires bankruptcy issues to be decided by article III judges, or whether it suffices for Congress to place initial decision in other hands, subject to the possibility of judicial control—whether, for purposes of the Bankruptcy Act, judges must be “in” the judiciary or merely controlled by the judiciary. If article III judges must decide, a second and related issue arose—whether the bankruptcy judges could be regarded as “adjuncts” to the courts, acting within article III although not article III judges, like United States magistrates. No majority of the Court could agree on a structural resolution, although six justices agreed that article I bankruptcy judges could not properly decide private disputes arising under state law that would ordinarily be decided by state courts.

The Court’s resolution of the first issue—what adjudicatory business must necessarily be submitted to article III judges—is the matter of chief interest here.²³⁹ Justice Brennan’s plurality opinion²⁴⁰ appeared to seek a bright-line definition of what types of action were inherently judicial and thus had to be performed within the judicial branch, rather than being overseen by it. On the basis of an inquiry into constitutional text, history, and the Court’s cases, the opinion identified three classes of cases, apparently judicial in character, that need not be tried in article III courts: cases heard before territorial courts or the courts of the District of Columbia (for which Congress enjoys plenary legislative authority), cases properly assigned to courts-martial, and decisions respecting claims against government that Congress would be free to commit entirely to executive discretion.²⁴¹ All other federal adjudicating must be done by article III judges.

The dissenters²⁴² examined the same materials as the plurality but came to a sharply differing conclusion: the Court’s cases permitting the assignment of judicial functions to other than article III judges cannot be reconciled with any theory of the article that requires all stages of certain types of decisions or

239. The second argument that bankruptcy judges might be regarded as adjuncts to article III courts drew principally on the decisions in *Crowell v. Benson*, 285 U.S. 22 (1932), and *United States v. Raddatz*, 447 U.S. 667 (1980). The plurality’s negative conclusion was grounded chiefly in the extensive powers granted bankruptcy judges over the matters before them, which it characterized as including “all ‘essential attributes’ of the judicial power.” 458 U.S. at 84–85. As a feature distinguishing the Bankruptcy Act provisions from those that had been upheld respecting workmen’s compensation commissioners (*Crowell*) or United States magistrates (*Raddatz*), this characterization of the scope of authority is persuasive. See *Kalaris v. Donovan*, 697 F.2d 376, 388 (D.C. Cir.), cert. denied, 103 S. Ct. 3088 (1983). Yet the more striking characteristic of this argument is its assumption that one *must* place the agency-adjunct *within* the judicial branch. If judicial and other powers must be rigidly separated, this argument saves the “judicial” function *only* at the cost of abandoning rulemaking and executive functions. Thus, this argument, too, ultimately demonstrates the frustrations of applying a strict separation-of-powers approach below the three named heads of government.

240. Written for himself and Justices Blackmun, Marshall and Stevens.

241. 458 U.S. at 64–70.

242. Justice White wrote for the Chief Justice and Justice Powell.

functions to be conducted in article III courts.²⁴³ Modeling their analysis on *Buckley's* inquiry into impact on function, the dissenters would have disapproved the creation of legislative courts on constitutional grounds only if they concluded that such tribunals threatened to emasculate the courts, aggrandizing the authority of the political branches at their expense and depriving citizens of the protection that can be supposed to come from an independent judiciary's authority finally to resolve issues of law—that is, if the use of legislative courts threatened to disrupt the scheme of checks and balances. The legislative courts created by the Bankruptcy Act pose no such threat because they are specialized, deal “with issues likely to be of little interest to the political branches,”²⁴⁴ and are subject to review by article III courts on terms that protect the core judicial functions of determining the meaning and application of nonstatutory law and exercising some control over determination of the relevant facts. Evidently, however, the dissenters' judgment that no such threat was present—like judgments about the impact of tort liability on the performance of official function—is highly subjective and open to debate.

In many respects, the opinions are astonishing.²⁴⁵ No majority of justices could agree on proper methodology for analysis of primary issues of constitutional structure. Nor could a majority agree on identifying what central functions of the judicial branch Congress could not place elsewhere, or on which materials to rely on in answering that question, or even on whether a coherent body of decision (using whatever referents) must ultimately emerge from a course of decisions. Three members of the Court went so far as to suggest that the justices could abandon the effort to give meaning to the Constitution's words—that the development of precedent and practice had made it “too late” to rely on the “simplicity of the principle pronounced in Art. III.”²⁴⁶

Although the plurality opinion did not deny that Congress's authority to create administrative bodies is extensive, the Court's disagreement whether (or when) the judicial function can be satisfied by judicial oversight nonetheless raised fresh questions about the viability of statutory arrangements for administrative adjudications long accepted as proper in the presence of adequate provisions for judicial review. As the plurality itself recognized, only the last of the three categories it identified—the “public rights” doctrine of *Murray's*

243. *Id.* at 105–13 (White, J., dissenting). Justices Rehnquist and O'Connor, concurring, limited themselves to the proposition that removal of a case that would otherwise be decided by state common law courts to federal bankruptcy jurisdiction required that the federal court of destination be an article III court. *Id.* at 91.

244. *Id.* at 115 (White, J., dissenting). At the opposite end of the spectrum are criminal defendants and the objects of intended speech regulation, whose cases often hold deep political interest.

245. Not the least of the surprising aspects of the decision is the Court's assertion that it could continue in effect for an interim period an allocation of judicial authority that it had found Congress could not constitutionally enact. *Id.* at 88; 103 S. Ct. 199 (extension of stay of mandate); 103 S. Ct. 662 (refusal to grant second extension).

246. 458 U.S. at 113 (White, J., dissenting).

*Lessee v. Hoboken Land & Improvement Co.*²⁴⁷—might permit avoiding the shadow thus cast on adjudications performed within “the executive Departments” or, at least, outside the article III judiciary. Under that doctrine, if “Congress would be free to commit such matters completely to nonjudicial executive determination . . . there can be no constitutional objection to Congress’s employing the less drastic expedient of committing their determination to a legislative court or an administrative agency.”²⁴⁸ But to make administrative adjudication turn on whether Congress could commit the matters completely to nonjudicial executive determination is both insufficient and unhelpful.

The Court’s analysis is insufficient because it leaves in shadow a great deal of administrative adjudication. As the plurality seemed to recognize but not confront, the whole point of the “public rights” analysis was that *no judicial involvement at all* was required—executive determination alone would suffice.²⁴⁹ If the availability of judicial review is a due process requisite of some administrative adjudications—and the cases seem to be telling us that it is²⁵⁰—the “public rights” analysis does not support the initial administrative determination in those cases where some judicial involvement is necessary.²⁵¹

The plurality’s analysis is unhelpful because it avoids the central question in the case: if article III control by judicial review is constitutionally satisfactory for resolution of disputes concerning public rights that could not be made subject to wholly executive disposition—a point thought to have been passed long ago—why is it not equally satisfactory for the resolution of disputes concerning the bankruptcy laws? The difficulty is heightened by the apparent agreement by plurality and dissent that in congressionally created programs Congress can assign adjudication to agencies, not article III courts, when the dispute is between the government and private citizens.²⁵²

This is not the place to work out a theory of judicial task under article III that distinguishes fully among those settings in which article III courts must perform their functions *de novo*, those in which article III courts must be involved *at least* to the extent of supervision of other tribunals’ results, and those in which article III courts need not be involved at any stage.²⁵³ What

247. 59 U.S. (18 How.) 272 (1885).

248. 458 U.S. at 68 (citation omitted).

249. The plurality hinted at the necessity of judicial review to support some types of administrative adjudication, *id.* at 69 n.23, but failed to see how that cut against reliance on the “public rights” doctrine.

250. *Goldberg v. Kelly*, 397 U.S. 254 (1970), repudiated the corresponding proposition—that since government didn’t have to create welfare programs it was free to adopt whatever procedures it might wish for denying welfare claims—while broadly indicating the constitutional necessity that judicial review be available. See also, e.g., *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442 (1977) (administrative assessment of civil penalty).

251. Nor can the agency-as-adjunct argument be made without embracing an equally large contradiction. See *supra* note 239.

252. 458 U.S. at 80 (plurality); *id.* at 94 (White, J., dissenting). One would think, however, that judicial impartiality is even more important when one party is the government than when not.

253. See Monaghan, *supra* note 127, at 18–20, (discussing *Crowell* and *Northern Pipeline*).

must be evident, however, is that the second of this set can no longer be treated as empty, whatever may once have been the case.²⁵⁴ And if it is not empty, the "public rights" doctrine cannot provide valid responses to separation-of-powers questions involving the judiciary. The central test to determine the appropriateness of an administrative structure must be the effectiveness of a relationship with article III courts to achieve the ends sought by article III, rather than the placement of a function in article III. This will be so whether one analyzes that relationship with a political impact test of the sort offered by Justice White, an historical analysis seeking out those questions most closely associated with jury and/or judicial decision, a comparison of regulatory regimes with the judicially administered remedies they replace, or some other alternative. While it seems entirely possible to defend the result in *Northern Pipeline* on some such terms,²⁵⁵ the plurality approach reopens doors long thought nailed shut. We have in fact agreed that the review relationship is adequate to assure article III protections in all but the most extraordinary of situations, including many in which that relationship could not constitutionally be dispensed with.²⁵⁶ Seen in this light, the plurality's assurances that administrative adjudications were not put in doubt by its approach to *Northern Pipeline* ring hollow; that a separation-of-powers argument could not be employed without casting so much doubt on central arrangements of government long thought secure suggests the difficulty of that approach.

3. *INS v. Chadha*. — Equally large questions were raised about settled arrangements of government and the viability of "separation of powers"—in this case, respecting the activities of article II legislators, rather than article I judges—by the decision last Term in *INS v. Chadha*,²⁵⁷ the legislative veto case. It is some indication of the disarray in the Court respecting separation-of-powers issues that the three opinions reaching the constitutional issues in *Chadha*, deeply differing with one another on both approach and outcome, were written by the three justices who had joined the previous term's dissent in *Northern Pipeline*. I have written at some length elsewhere²⁵⁸ about the diffi-

254. That is, for some of the cases we have been sweeping in under the "public rights" label, due process considerations would prevent Congress from leaving non-article III actors free of the control of judicial review.

255. Thus justices Rehnquist and O'Connor suggested that the displacement of common law cases from state courts of ordinary jurisdiction to a federal bankruptcy tribunal requires the use of article III tribunals in light both of the character of the cases and the special considerations that come into play when state authority is displaced. 458 U.S. at 90-91.

256. One need consider only the disappearance of the "constitutional fact" question from contemporary teaching and thinking about administrative law, once the Court's decision in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936), and widespread use of administrative law judges had settled issues about the possible objectivity of administrative fact-finding. See also Monaghan, *supra* note 127, at 18-20.

257. 103 S. Ct. 2764 (1983).

258. Strauss, *supra* note 5.

culties of the several opinions²⁵⁹ in that case. There, I sought to show the importance of a distinction no justice had observed, between use of the veto in matters affecting direct, continuing, political, presidential-congressional relations and use of the veto in a regulatory context. I argued that the Court had to reach only the latter situation and that only that situation presents the constitutional difficulties that troubled the Court. Here, my purpose is to focus on the implication of the Court's failure to make that distinction on the choice between the separation-of-powers and checks-and-balances models in assessing congressional arrangements for governmental structure. The *Chadha* majority's invocation of the compartmentalization inherent in "separation of powers" cast doubts that it struggled to dispel on the continued viability of agency rulemaking; attention to checks-and-balances issues could have resolved the case without imposing that doubt—or, for that matter, undercutting the utility of the legislative veto in the political context.

Jagdish Chadha was a deportable alien found by an immigration judge of the Department of Justice's Immigration and Naturalization Service (the Department) to have established a claim to a compassionate suspension of deportation under section 244 of the Immigration and Nationality Act.²⁶⁰ Under that statute, refusals so to find are subject to judicial review while favorable findings are to be transmitted to Congress, to take effect only if neither the Senate nor the House of Representatives repudiates them by resolution during the two sessions following.²⁶¹ In Mr. Chadha's case, the House adopted such a resolution at the last possible moment, without printed text, debate, or significant explanation. The issue before the Court²⁶² was the validity of that resolution—that is, of what might be described as the condition Congress attached in conferring on immigration judges the authority to suspend deportations. This problem had two aspects: the first, unimportant here, was whether the "legislative veto" regime must meet the formal constitutional requisites for legislation, bicameral consideration and presentment to the President for possible veto;²⁶³ the second was whether the regime violated

259. The Chief Justice, writing for himself and five others, found the legislative veto unconstitutional in an opinion broadly indicting all such provisions; Justice Powell, writing for himself, would have decided the case on grounds applicable principally to this statute; Justice White dissented in an opinion that seemed unqualifiedly supportive of the legislative veto. Justice Rehnquist also dissented, but on the nonconstitutional ground that (in his view) the suspension and legislative veto provisions of the statute were not severable, so that effective relief could not be given to Chadha.

260. 8 U.S.C. § 1254 (1982).

261. This mechanism—the occasion for 111 out of 230 legislative vetoes ever exercised by Congress under any statute through the Summer of 1982—had been adopted to substitute for a prior practice of granting all such relief through private bills passed by the Congress, while maintaining congressional control. See Smith & Struve, *Aftershocks of the Fall of the Legislative Veto*, 69 A.B.A. J. 1258 (1983).

262. A number of procedural hurdles not relevant here had to be passed before the Court could reach the merits.

263. The majority's reasoning on that point was conclusory. Of course the formal requirements must be met before Congress can adopt some new statement of affirmative principle as law

the separation of powers by granting to Congress functions reserved to the President or the courts.

In finding such a violation, the majority opinion strikingly returns to the formalities of *Humphrey's Executor* at the same time as it repudiates the particular use to which they were put in that case. Although denying any purpose to suggest that the three branches of government are "hermetically sealed," the opinion makes its dominant metaphor an expression of fear lest the "hydraulic pressures" of power-seeking burst the boundaries of each branch's appropriate function—a palpable evocation of the "air-tightness" of the *Myers-Humphrey's Executor* approach.²⁶⁴ Where the *Humphrey's Executor* Court accomplished its ends by placing "quasi-adjudication" and "quasi-legislation" outside the executive branch, however, the *Chadha* majority identifies both as executive branch activities²⁶⁵—a characterization consistent with *Buckley v. Valeo*²⁶⁶—and thus finds a significant question whether Congress has usurped the President's power.

Note that the decision here subjected to congressional review cannot easily be characterized as the President's: it was made in the first instance by a civil servant strongly protected against political interference in his judgment and required by statute to decide the case before him "on the record."²⁶⁷ The difference between decisions that are explicitly presidential and those that are not is that the compartmentalization inherent in the separation-of-powers idea is an essential element of the framer's plan only for the former. Special questions are raised when the acting body is one of the named actors of the Constitution—Congress, President, and Supreme Court—who occupy the apex of power and whose excesses are for that reason the most greatly to be

binding upon the citizenry or the government. The problem for the case was to determine whether they properly apply to a standardless, contentless expression of disapproval of an immigration judge's decision, with no possibility of expressing more than a simple negative as to the (proposed) suspension of a particular deportation order whose validity had been made conditional on the failure of either house to express such a negative. The Chief Justice's majority opinion solves the problem by treating the immigration law judge's action and the House resolution as distinct legal acts—as if the suspension were a final act, then reversed by the resolution. He is thus enabled to characterize what the House did in *Chadha's* case as "altering . . . legal rights," 103 S. Ct. at 2784, and hence (on his view) within the requirements of bicameralism and presentment. Yet, under the statutory scheme as Congress enacted it, *Chadha's* technical right to remain in the country could not be conferred by the INS alone; it is conferred if the INS acts and then neither house of Congress does. To say that he has acquired a right that the House is now purporting to take away is to assert the desired conclusion, not to reason to it. See generally Strauss, *supra* note 5.

264. 103 S. Ct. at 2784; see *supra* text accompanying note 149.

265. 103 S. Ct. at 2785 n.16.

266. See *supra* text accompanying notes 177-78.

267. Immigration judges are neither statutory administrative law judges nor bound (in terms) by the Administrative Procedure Act, 5 U.S.C. §§ 551, 553-710 (1982); see *Marcello v. Bonds*, 349 U.S. 302, 309 (1955). Nevertheless, they serve under statutes and well-established rules and administrative arrangements providing equivalent safeguards from political oversight. See 8 U.S.C. § 1252(b) (1982); 1A C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 5.7 (1982); 2 *id.* § 8.12(b) (1983).

feared. It is the potential powerfulness of those heads of government that gives special meaning to the formalities of the document. For the inferior parts of government, subject to law and the webs of control woven by all three of the named heads,²⁶⁸ the same risks do not arise; agency actions are of lesser concern than the President's for just this reason. Presidential actions are more threatening to the stability and balance of government, to the containment of power at its apex, than any authority given an agency under partial control of all three named heads of government is likely to be.²⁶⁹ For the agencies, the questions of relationship suggested by *Buckley* and *Nixon v. Administrator of General Services* have greater constitutional significance.

The problem with using a compartmentalization approach below the very apex of government is illustrated by the trouble the majority encountered in rationalizing agency rulemaking. Reconciling the proposition that an action that alters legal rights is "legislative in purpose and effect" with its characterization of rulemaking as an executive function²⁷⁰ posed the same difficulties for the Court as it had had to face, in the context of agency adjudication, in *Northern Pipeline*. "To be sure," the Court acknowledged, "rule making . . . may resemble 'lawmaking,'"²⁷¹—indeed, from the familiar perspectives of administrative law, the end product of rulemaking resembles lawmaking far more than did the House Resolution in *Chadha*. But, asserts the Court, since the President is doing it, it is not "lawmaking": "[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker,"²⁷² quoting Justice Black's troubling majority opinion in *Youngstown Sheet & Tube*. Both halves of this proposition—that the President himself is acting when an agency adopts a rule, and that the activity is not "lawmaking"—are seriously problematic.

The very purpose of delegation is to permit the delegate to create legally binding prescriptions—that is, to act *as if* it were a legislature, albeit within legislatively created substantive and procedural constraints. Of course the agencies *are* lawmakers, in any conventional sense of the term, when they engage in rulemaking pursuant to statutory authorization.²⁷³ If the President

268. For the immigration judge, one such control might be judicially enforced apoliticality. For example, many would think *Chadha* would have had a cogent complaint had the President called the Attorney General on the telephone and instructed him to tell the sitting immigration law judge that *Chadha's* deportation order was not to be suspended, because the President had concluded that the statutory criteria were not met; it would be asserted that Congress had validly delegated the function of on-the-record decision to the immigration law judge, irrespective of "where" in government he might be placed. See *supra* text accompanying notes 196-98.

269. See *supra* note 154.

270. *Chadha*, 103 S. Ct. at 2784, 2785 n.16.

271. *Id.* at 2785 n.16.

272. *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952)). As Professor Bruff has pointed out, the opinion must be understood as the product of a context in which no issue of delegation was involved. "Justice Black's separation of powers analysis was sufficient to dispose of the case at hand, but it was unduly simplistic. His broad dictum . . . is refuted by the reality of executive power under most legislation." Bruff, *supra* note 47, at 472.

273. Indeed, in recent contexts the Court has stressed this point by insisting on explicit statutory authorization for any agency seeking to adopt "legislative"—that is, legally binding—rules. See, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979).

is himself engaging in rulemaking under delegation, then the argument that "lawmaking" is restricted to the legislative branch is in serious difficulty.²⁷⁴ The Court seems to make the *Youngstown* passage mean: "The President does not act legislatively because he is the chief executive; the House does, because it is part of Congress. What the President does is *ipso facto* executive; what the Congress does, legislative."²⁷⁵ The Court identifies agency rulemaking with presidential rulemaking; it then asserts that, because the President can only act executively, rulemaking is safe from any claim that requirements of presentment or bicameralism apply—however like lawmaking it is.

Freeing ourselves of the equation of presidential with agency action would make it possible both to acknowledge the lawmaking character of rulemaking and to place it in the constitutional structure in ways that promise continued adherence to the basic values of the constitutional scheme. Congressional delegations of regulatory authority are most often made not to the President, but to some executive branch or independent agency. It is, to say the least, not at all clear that the President is entitled to participate in the proceedings of these bodies to the extent suggested by calling him the delegate.²⁷⁶ Since rulemaking may seem especially problematic when it is in fact performed by the President, one ought not rush to identify an agency with him when its functions remain generally in the control of all three branches of government. Treating an agency as if it were inevitably "here" or "there" tends to create the logical puzzles we have seen the Court working so hard to avoid.²⁷⁷

Suppose the Court had been willing to dissociate the agency from the President and had focused primarily on the question of the relationships between the agency and the three named heads of constitutional authority. From that perspective the legislative veto issue might have looked rather different. The question would then be what impact the legislative veto could

274. Reconsider, in this light, the Court's negative reaction to the delegation in the National Industrial Recovery Act, see *supra* note 149, and its emphatic statement in *Humphrey's Executor*, on the same day it took that action, that precisely because the agency was acting quasi-judicially and quasi-legislatively, it was "in" the legislative and judicial branches, and "no part" of the executive branch. See *supra* notes 148-53 and accompanying text.

275. Another suggestion that the Court intends this approach is found in a repeated "presumption" that a governmental body is acting within its delegated sphere. See *Chadha*, 103 S. Ct. at 2784.

276. See, e.g., *United States v. Nixon*, 418 U.S. 683, 694-96 (1974) (departmental regulation freed special prosecutor from direction by President in prosecutorial choices, a quintessentially executive activity); *Sierra Club v. Costle*, 657 F.2d 298, 405-08 (D.C. Cir. 1981) (discussion of presidential participation in rulemaking). For further discussion, see Nathanson, *supra* note 30, at 1099-109; Strauss, *supra* note 5, at 807-12; Verkuil, *supra* note 55, at 963-70.

277. The *Chadha* Court came close to realizing the problems of a formal separation-of-powers analysis when it distinguished the Department of Justice's action from the House of Representatives' by invoking the functional consideration that the Department's actions had been authorized, and consequently limited, by a statute. 103 S. Ct. at 2785 n.16. That fact, with the attendant processes of review, made the bicameral process unnecessary as a check. Understood as a proposition that the actions of the Department of Justice were not a matter of concern precisely because they were *not* the President's but the actions of a subordinate part of government, this distinction may be helpful.

be expected to have on the President's own relationship with the agency and, in particular, on his claim to function as the sole head of government. A veto mechanism need not defeat such a claim; indeed, the more it seemed that the action being taken was fairly to be characterized as the President's own, the less objectionable the veto might be. From a checks-and-balances perspective, the need for cross-checking institutions of control is the more urgent where authority is to be exercised by one of the named heads of government. For example, in the reorganization context it might readily be argued that Congress could afford to confer the authority to initiate restructuring of government on the President only if it reserved the counterbalancing possibility of "legislative veto" disapproval. The President, gaining the initiative through the authorizing legislation, would hardly lose in the exchange.²⁷⁸

Where the action clearly is not the President's, on the other hand, the legislative veto begins to appear, not as a device for sharing enlarged responsibility within government, but as a means for enhancing congressional political controls at the expense of presidential ones. At least within a certain range, we have seen that Congress readily can exclude the President from political control of regulatory outcomes.²⁷⁹ Yet the rationale for these measures, and for the apparent offense they give to the President's claim to serve as the unitary head of executive government, equally requires that Congress exclude itself from such controls. A measure that enhances Congress's political controls while isolating the President would threaten both his position as unitary head of government, and his continuing capacity to function as a political counterweight to Congress. Thus, in *Chadha*, Congress's reserved power to disapprove a proposed suspension is made even more problematic by the "on-

Taken as an assertion of the difference between the necessary controls over the actions of the President and those over the actions of the Congress, however, the Court's argument proves too much. The House's action, no less than the Department's, was authorized and limited by a statute, and could occur only within its terms—subject, no doubt, to judicial correction if they were exceeded.

If, for example, the House had sought to act after the statutory time had expired, or to attach a condition to Chadha's remaining, it seems clear that habeas corpus would have relieved him of any deportation order and established his right to permanent residence. That the House's judgment *within those bounds* did not have to be explained and was not open to review suggests other bases upon which the statutory mechanism could be questioned. See Strauss, *supra* note 5, at 799. However, it is hard to understand how these difficulties turn the House's exercise of its very limited options into a "legislative" act. The judgment suspending Mr. Chadha's deportation order was equally free of the possibility of review (unless in the Congress, pursuant to the act), even if entered in an entirely unauthorized manner—for example, in response to a bribe, or, less dramatically, without considering one of the required factors or in consideration of an irrelevant one. The *Chadha* Court did not find in this a reason to regard the Department's action to be legislative; indeed, it seemed to take reassurance from the fact that the most lawless of acts by the INS suspending an otherwise valid deportation order would not be subject to correction in any forum. 103 S. Ct. at 2787 n.21.

278. See Strauss, *supra* note 5, at 815. For an indication of the trouble sown by the Court's approach, compare *EEOC v. Allstate Ins. Co.*, 570 F. Supp. 1224 (S.D. Miss. 1983), with *Muller Optical Co. v. EEOC*, 33 Fair Empl. Prac. Cas. (BNA) 420 (W.D. Tenn. Nov. 10, 1983).

279. See *supra* text accompanying notes 196-98.

the-record" regime within the Department that impairs direct presidential control. If the President is excluded from directing that a given rule be adopted, amended, or rejected while Congress is able to assert that authority, one has lost the intended focus of responsibility and balance.

Viewed in another light, such a use of the legislative veto is an end run around the President's claim to participate in legislative action through his own veto; if Congress could by a single legislative act establish a body subject to its political domination and free of presidential control for the adoption of positive law, then the engine for veto avoidance would have been defined. The difference between this view and what the Court appeared to be doing in *Chadha* lies precisely in the amount of attention given the actual role of the President in the action made the subject of a possible legislative veto. Under this view, it is not the veto alone, but the veto in conjunction with the congressional delegation of power away from the President—the assertion of differential claims to political control favoring the Congress and tending to create a multiheaded executive—that is the objectionable measure. Note that it is not necessary in this analysis to know where in government the agency is located, or how to characterize the function it is performing.

The preceding review of the existing institutions of American government and of the body of textual, contextual and interpretational constraints bearing upon them should cast doubt on the idea that our Constitution *requires* that the organs of government be apportioned among one or another of three neat "branches," giving each a home in one and merely the possibility of relations with the others. President, Congress and Supreme Court are undoubtedly to be distinct in form and in function; below that level the text does not speak, sharp distinctions are frequently hard to find in fact, and the Court's occasional efforts to find them in theory have repeatedly led to embarrassments.

Thus to recognize that most of administrative government²⁸⁰ lies outside the constitutionally defined structure would not defeat the purposes either of separation of powers or of the system of checks and balances. The notions of checks and balances and (as an identifier of strong claims to attenuate political controls across the board) separation of functions are more vital in understanding the place of agencies in government. So long as separation of powers is maintained at the very apex of government, a checks-and-balances inquiry into the relationship of the three named bodies to the agencies and each other seems capable in itself both of explaining fully the results of past inquiries into the permissible structures of government below its apex, and of preserving the framers' vision of a government powerful enough to be efficient, yet sufficiently distracted by internal competition to avoid the threat of tyranny. This approach reflects common political science and presidential perceptions of the way government actually works without the evident conceptual embarrassments of "the qualifying 'quasi.'"²⁸¹

280. See *supra* note 11.

281. See *supra* note 16.

A focus on checks and balances could tend to emphasize struggles among the three branches for positions of control, and to ratify the bureaucrat's sense that he constitutes a legitimate fourth force in government, making control that much harder. Such a focus would be consistent with article II's references to the President, rather than an executive branch, a limitation which seems to have figured so prominently in the result in *Nixon v. Fitzgerald*. This approach might also provide the means that many have sought to understand the administrative functions of government without requiring either radical dissociation of agencies from the controlling institutions outlined in the constitutional text²⁸² or total abnegation of judicial control over congressional choices respecting governmental structure.²⁸³ Emphasizing the preservation of unresolved tension among the named branches also aids in understanding the allocation of control authority and control mechanisms as between the President and Congress. If the question is how much control the President must be permitted to exercise, this model underscores the absence of any significant distinctions between the independent commission and most if not all executive departments. There remains a single President as the politically responsible head of law-administration.

III. "CHECKS AND BALANCES" AS A LIMIT ON CONGRESS'S AUTHORITY TO CREATE THE STRUCTURE OF GOVERNMENT

This Part of the essay supposes that government agencies charged with administering public law are *not* to be regarded as having been placed in one or another branch but rather exist as subordinate bodies subject to the controls of all three. Having thus put the agencies, in some sense, "out" of the executive branch, perhaps the most pressing question that remains is what if any relationship between an agency and the President might Congress (and the courts) still be required to honor. The issue what constraints exist on Congress in giving structure to government is thus to be assessed under the somewhat elusive checks-and-balances approach partially adopted in *Buckley and Nixon v. Administrator of General Services*.²⁸⁴

From the text, three principal constraints emerge: that the President must appoint at least the head of any agency doing the work of government; that the agency in doing that work must have a relationship with the President consonant with his obligation to see to the faithful execution of all laws;²⁸⁵ and that, in particular, the President must have the authority to demand

282. See, e.g., Grundstein, *supra* note 11.

283. Cf. Choper, *supra* note 194.

284. See *supra* text accompanying notes 171-98.

285. One need not force a choice between the active and caretaker views of the Presidency, E. Corwin, *supra* note 74, to observe that both imply *some* relationship with the chief executive consistent with his position as chief executive. However much the authority to decide might be put in the agency itself, a capacity to place it there does not imply the further step—deeply destructive of the constitutional scheme—of placing it there subject to the political supervision of others than the President.

written reports of the agency prior to its action on matters within its competence, with the strong implication that consultation if not obedience will ensue. Central to the overall judgments of the Constitution, and reflected in these textual passages, is the elementary judgment that we were to have a unitary, politically responsible head of government, possessed of sufficient independent authority to serve as an enduring counterweight to the political muscle of Congress. Arrangements destructive of such a role—whether creating a “multiple executive,” defeating the possibility of presidential political responsibility for the work of government, or threatening the President’s continuing capacity to resist the Congress—are for this reason suspect.

This Part argues that these constraints at a minimum require that Congress observe a principle of parity in its treatment of the possibility of political control of agency action by itself and by the President. Fairness and separation-of-*functions* considerations may often support exclusion of an agency or at least certain types of agency action from the domain of politics generally. However, Congress cannot expect to reserve political oversight for itself without recognizing corresponding oversight responsibilities in the President. Yet parity is a minimum; the President by virtue of his office as chief executive may be able to claim relationships beyond the constraints of parity. Recognition by the courts of a constitutionally based claim of executive privilege—that is, of private communication with agencies directly responsible for law-administration—is the most obvious example of such a claim. A more controversial claim would be for a requirement that Congress recognize presidential authority to resolve or mediate at least some types of internal policy disputes—for example, those placing separate agencies in direct confrontation with each other—or requiring judgments beyond a particular agency’s ordinary responsibility and expertise.

The extent to which the President must have ultimate decisional control over all executive actions must be a function of the constitutional history. The rejection of the Sherman position, envisioning a multi-headed executive wholly defined by Congress,²⁸⁶ provides a reference point at one end of the spectrum. Its rejection underscores the decision to make the President an effective, unitary executive. Within the range of permissible structures, the proper degree of presidential involvement was left undetermined. Nonetheless, his powers vis-a-vis government in general and Congress in particular were to be sufficient to give some assurance of maintaining a continuing tension over ultimate political authority between himself and Congress—no one branch was to become dominant. Rather than choose between the competing views of President as executor and President as overseer of execution, I want to argue that even the lesser of these views, when understood in a way that supports these structural imperatives, would imply the need for a substantial presidential relationship with any agency performing a significant governmental duty exercised pursuant to public law.

286. See *supra* notes 97-111 and accompanying text.

Thus, Congress's authority to create the government's structure must be constrained in a manner that will preserve essential conditions of the President's intended political responsibility for the day-to-day, law-implementing activities of government. Even the most modest notion of what constitutes executive power suggests that the President must retain substantial lines of communication and guidance. To deny the President that authority would be to deprive him and the public of that responsibility, and effectively to permit the Congress, again, to establish multiple centers of law administration primarily under its control.²⁸⁷ Similarly, the execution of not a single law but many inevitably raises questions of priority, conflict, and coordination that are almost never addressed in any of the acts concerned; particular departments, with their narrow responsibilities, may be incapable of appreciating the interplay.²⁸⁸ Attending to these conflicts seems an inevitable aspect of a chief executive's function. That a legislature creates a statute and makes its application mandatory, or perhaps dependent upon stated circumstances, does not mean that the legislature will bestow the resources necessary to achieve that end, that it ever "intended" full enforcement, or that it has carefully thought through the relationship of the new mandate to those that have preceded it and those that will follow. In addition to resolving these conflicts and setting priorities among statutes is the practical requirement of coordinating law-administration with political program and molding both to changing circumstances. The day-to-day course of national affairs generates new issues to which a coherent response must be made and for the resolution of which the public will hold the President politically responsible.

As we saw in the preceding Part, the Court has found that the inquiries suggested by the checks-and-balances notion often lead to imprecise results. Yet the difficulties at the margin of saying whether given arrangements threaten "core functions" that are themselves imprecise—whether one is speaking of the President's functions, the Court's, or the states'²⁸⁹—are not sufficient justification for refusing the inquiry. Although the stakes may be higher, the task thus facing a court does not differ in principle from the paradigmatic task of determining whether discretion has been abused on judicial review of acts of administrative discretion.²⁹⁰ The very existence of discretion marks a zone within which the court is not permitted to substitute judgment, but must respect the higher authority of the agency acting to

287. See *Sierra Club v. Costle*, 657 F.2d 298, 405-06 nn.520-26 (D.C. Cir. 1981).

288. *Roads to Reform*, *supra* note 55, at 70-72. One need not work for long in a prosecutor's office, a quintessentially "executive" place, to appreciate how legislators, reacting episodically to public demands for protective law, people the landscape with laws in far greater number than can reasonably be enforced, with laws that conflict with each other or encroach upon one another, and with laws that, although stated in mandatory form, clearly require priority ordering and reconciliation.

289. See *supra* text accompanying notes 170-95.

290. In administrative law terms, the review function is to be thought of in terms of § 706(2)(A) review for *abuse* of discretion rather than § 701(a)(2) exclusion of review of action "committed to agency discretion by law." 5 U.S.C. §§ 701(a)(2), 706(2)(A) (1982).

determine the matter before it. Yet maintaining that discretion within a framework of law also implies that the court will on occasion be able to determine that the agency's discretion has been abused. The court can make that determination easily where straightforward violations of governing law can be identified, and with more difficulty when it can only point to a diffuse combination of factors operating in a particular context as the basis for its judgment.²⁹¹ Undoubtedly Congress has been given enormous discretion in shaping the instruments of government within the constitutional scheme; yet maintaining the Constitution as an instrument of law does not permit us to characterize this discretion as being without ascertainable constraint. Professor Choper asserts that courts should treat all these structural questions as "political," and hence decline review.²⁹² "Political question" may in fact be an appropriate sobriquet for that range of discretion Congress undoubtedly has, the area within which it is free to express its judgment.²⁹³ To deny judicial function in assessing the limits of that discretion, however, would connote not merely judicial modesty but also a denial of the role of law and, ultimately, a denial of the vision of law as perpetuating the constitutional order.²⁹⁴

A. Constraints Arising Out of the Constitution

Whether or not an agency is to be equated with the President in some constitutional sense, the constitutional text directly requires three forms of relationship between the President and the head of that agency: the President is to appoint the agency head with the advice and consent of the Senate;²⁹⁵ the President may require the agency head to give an opinion, in writing, "upon any Subject relating to the Duties of [the] . . . Office[]"²⁹⁶; and, most diffusely, the relationship must otherwise be such as to permit the President effectively to "take care that the laws be faithfully executed."²⁹⁷ Examination of these required relationships shows their link to the preserving of tension among the named branches; the link to that necessary condition, in turn, permits a more confident analysis of these requirements.

1. *The Appointments Power.* — *Buckley*²⁹⁸ reflects the first of these relationships, which appears to be well understood and—as that case reflects—readily susceptible of enforcement. Congress has not entirely given up the effort to create institutions over which it or its delegates, rather than the

291. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14 (1971).

292. See *supra* note 194.

293. See Henkin, *Is There a "Political Question" Doctrine?*, 85 *Yale L.J.* 597 (1976) (per curiam).

294. See Monaghan, *supra* note 194, at 302-06.

295. U.S. Const. art. II, § 2, cl.2. The "Advice and Consent of the Senate" is waivable by Congress if one understands the agency heads as "inferior Officers" whose appointment "Congress may by Law vest in the President alone."

296. U.S. Const. art. II, § 2, cl.1.

297. U.S. Const. art. II, § 3. See generally *supra* text accompanying notes 85-93.

298. *Buckley v. Valeo*, 424 U.S. 1 (1976).

President, enjoys or shares appointment authority. In its most recent effort, the creation in late 1983 of a new form for the United States Civil Rights Commission (the Commission), Congress sought to use the possibility left open by *Buckley* of congressional appointments to agencies not performing "a significant governmental duty."²⁹⁹ Until 1983, the Commission had been composed of six members appointed by the President with senatorial confirmation to terms of indefinite length, under requirements of bipartisan affiliation³⁰⁰ such as have generally characterized "independent regulatory commissions." When President Reagan proved unable to persuade the Senate to confirm nominations he had made to replace some of its sitting members, he purported to remove those members from office without replacing them (and also without asserting cause). The ensuing controversy³⁰¹ was terminated by compromise legislation³⁰² reconstituting the Commission as a body of eight members serving six-year terms—four appointed by the President without requirement of confirmation but subject to bipartisanship requirements, and two appointed by each of the chief officers of the houses of Congress, on recommendation of the party leadership in each house.³⁰³ Potential *Buckley* problems were recognized but answered, it was thought, by denying the

299. *Id.* at 141. Another recent example involving congressional appointments, the Cost Accounting Standards Board, is discussed briefly below. See *infra* text accompanying notes 341-44.

300. That is, no more than half the members of the Commission could belong to any one political party. Civil Rights Act of 1957, 42 U.S.C. § 1975 (b) (1976) (amended 1983).

301. Two of the three commissioners ostensibly removed in this way brought suit, based on *Humphrey's Executor*, to enjoin interference with their continued performance of duty. *Berry v. Reagan*, 32 Empl. Prac. Dec. (CCH) ¶ 33,898 (D.D.C. Nov. 14, 1983), dismissed as moot, No. 83-2184 (D.C. Cir. 1984). The district court judge granted a preliminary injunction on finding in the legislative history sufficient indications that the Commission had been intended to be independent and its commissioners, therefore, removable only for cause. The court regarded the problem of the commissioners' apparently indefinite terms as answered by the temporary character of the commission; as the commission was itself authorized for only a few years at a time, requiring periodic reauthorization, the terms of the commissioners could be regarded as fixed by the term of the Commission. *Cf. Wiener v. United States*, 357 U.S. 349 (1958) (similar reasoning with respect to independent War Claims Commission). The preliminary injunction was continued in effect during an appeal, and the district court opinion was then vacated as moot when the authority of the existing Commission expired and the substitute arrangements discussed in the text were enacted. *Berry v. Reagan*, No. 83-2184 (D.C. Cir. 1984).

Compare *Kalaris v. Donovan*, 697 F.2d 376 (D.C. Cir.), *cert. denied*, 103 S. Ct. 3088 (1983), in which members of the Department of Labor's Benefits Review Board (the Review Board) were found not to have such "for cause" terms and thus could be removed by the Secretary of Labor without cause having to be stated. The members were departmental, not presidential, appointees, and the Review Board's permanency precluded arguments that its duration marked the effective fixed term. *Id.* at 395-96. The court did not have to consider whether the unexplained removals of the Review Board members resulted from efforts to influence particular on-the-record proceedings before them, and acknowledged that such efforts could raise due process claims for particular litigants. *Id.* at 399 n.91.

302. United States Commission on Civil Rights Act of 1983, Pub. L. No. 98-183, 1984 U.S. Code Cong. & Ad. News (97 Stat.) 1301.

303. *Id.* § 2 (b).

Commission any law-administering function. Its only authorities were to conduct investigations and to make reports³⁰⁴—activities as much within the authority of Congress as the President, and thus not presenting the issues that had driven the *Buckley* result.

Putting aside any questions whether in fact the *Buckley* dicta support this arrangement,³⁰⁵ the first appointments to the Civil Rights Commission under the new design highlight the weaknesses of a system that substitutes divided, unchecked powers for the checks-and-balances approach. Part of the asserted political compromise that led to the new arrangements was an understanding that the President and relevant congressional officials were going to use their appointment authority to install particular nominees, including two of those the President had purported to fire.³⁰⁶ Other appointments were made,³⁰⁷ however, and it immediately became evident that the unchecked authority to appoint by the new scheme offered far less opportunity for political struggle than had the prior arrangements.

The prior arrangements, one might have thought, set terms fixed by the possibility that the President might nominate *and the Senate confirm* replacements; in effect, that is the termination point for the commissioners of many current independent regulatory commissions, who may serve past the end of their designated terms if a successor has not yet been confirmed.³⁰⁸ The President's effort under the previous statute to obtain confirmation of the replacements—appointments permitted under the new arrangement to be made unchecked—had failed precisely because of the requirement that he propose publicly the action he meant to take and because of the ability of opponents then to bring effective countervailing pressure to bear in another political forum. That the President and Congress may now each select half the membership of the Commission free of any need to secure the approval of the other, in other words, has produced a significantly diminished check on the outcome as a whole.³⁰⁹ And that the President and Senate may not now together effect a change in the membership of the Commission without "cause" gives those unchecked political appointments, once made, extraordi-

304. *Id.* § 5.

305. See *supra* text accompanying notes 177-80. While investigation and reporting are distinctly auxiliary functions that might be performed by any of the three branches in pursuit of its own functions, the Civil Rights Commission was to perform them as ends in themselves, carrying out statutory delegations. Inevitably the simple fact of such activities and their results can affect the lives of private citizens in important ways. But see *Hannah v. Larche*, 363 U.S. 420 (1960). One might on this basis construct an argument that presidential appointment of the heads of this agency is required, but that argument need not be pursued here.

306. *N.Y. Times*, Dec. 17, 1983, at 9, col.6.

307. *Id.*

308. While a person holding such an office may appear subject to greater personal pressure than one holding office for a fixed term of years, the tenure enjoyed is still more definite than that associated with service at the President's pleasure.

309. Compare *supra* note 180.

nary staying power.³¹⁰ In this way, the apparent purposes of the appointments clause have been undercut.

2. *Opinions in Writing.* — In contrast to the appointments power, often enough the occasion for important constitutional litigation, the opinions in writing clause may seem one of the Constitution's more trivial pronouncements.³¹¹ The Supreme Court seems never to have had to decide a question of its application. Given, however, *Buckley's* perception that all persons heading agencies charged with law-administration are "Officers of the United States" within reach of the appointments power, it would seem to follow that all are the "Heads of Departments," and consequently subject to the requirement that they respond to presidential requests for opinions in writing.³¹² Certainly both presidents and independent agencies seem so to have understood the relationship, although the President has not always insisted upon it. Thus, at least two presidents have been publicly advised by the Department of Justice that they would be entitled, as a legal matter, to insist that independent regulatory commissions as well as cabinet departments supply them with analyses of the probable economic impact of proposed rules.³¹³ Presidents who regarded the United States Civil Rights Commission as independent, in the sense that they could not obstruct its actions or dictate its reports, acted as if they were entitled to a preview of those reports and an opportunity to discuss them, and the Commission, like its more directly regulatory counterparts,³¹⁴ willingly responded.³¹⁵

310. The question of Congress's authority to limit presidential removal of government officials, not addressed in the text, has of course long been associated with the express power of appointment. See *supra* notes 144-46 and accompanying text. The question, however, seems part of the larger issue of presidential discipline over the agencies' performance—an aspect of his constitutional duty to "take care that the laws be faithfully executed" and of his unshared political responsibility if they are not.

311. Justice Jackson characterized the clause as "trifling" in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 & n.9 (1952)—an authority so self-evident that the drafters' decision to express it cast doubt on broad constructions of executive authority. Its only recent application, *State v. Carter*, 462 F. Supp. 1155 (D. Alaska 1978), produced a holding that the President's constitutional authority to seek the advice of the Secretary of the Interior could not be burdened by the requirements of the National Environmental Policy Act. See also Proto, *The Opinion Clause and Presidential Decision-Making*, 44 Mo. L. Rev. 185 (1979).

312. Although the text of the opinions in writing clause speaks of "the executive Departments" and the appointments clause merely of "Officers" and "Heads of Departments," it would be captious to regard the clauses as differing in their referents. Resolution of the issues respecting executive power did not occur until the final days of the Convention, under pressures that produced understandably imperfect drafting. See, e.g., *supra* note 108. See generally *supra* text accompanying notes 99-106. No indication appears of any thought that different referents were intended. Although the framers appear to have expected that law-administering authority would be delegated to others than the President, the fact remains that no other part of the Constitution speaks directly to the character of their relationship with him.

313. See *supra* notes 76-77 and accompanying text.

314. See W. Cary, *supra* note 66, at 18-19, 23-24.

315. See, e.g., Memorandum in Opposition to Appellant's Emergency Motion For Summary Reversal, at 46, *Berry v. Reagan*, 32 Empl. Prac. Dec. ¶ 33,898 (D.D.C. Nov. 14, 1983), dismissed as moot, No. 83-2184 (D.C. Cir. 1984). President Kennedy is said to have complained about not

Regarding the opinions in writing clause as expressive of the President's necessary relationship with those parts of government responsible for administering its laws would have sharp implications for congressional controls. No agency could be made so independent of presidential oversight as to deny that relationship. There could be no obligation of reporting to the Congress only, and thus any congressional notion that "the independent agencies are ours" must fail. Beyond that simple negative, the strong implication of having such a clause—confirmed by what is known of the discussions that preceded its adoption³¹⁶—is that the communication the President may demand would be one made to him in private and made in time for relevant action or response on his part (that is, prior to the agency's own final decision). These requirements would obtain whether the President were entitled to direct the outcome, only to speak to it, or merely to be informed what is likely to occur. Conversely, public, after-the-fact notification would deny any effective President-agency relationship and would inhibit the President's capacity to mobilize the remainder of government to respond to the measure being taken. These impacts would be heightened were Congress to assert that it or its agents should be given private advice on some issue within the agency's responsibility or be informed in advance of the public announcement of some agency decision.

Suppose, however, that Congress itself abjures any such claim, and that the decision to be taken is one readily understood as requiring action outside any suspicion of political determination—for example, decision in an on-the-record adjudicatory setting. Has the President nonetheless an opinion-in-writing claim to be privately informed on the matter in issue, before public announcement of decision, in spite of the appearance of possible political influence?³¹⁷ It is difficult to fashion a *structural* argument that would protect a decisionmaker other than an article III judge from such a claim, for any such argument would deny the presidential role.³¹⁸ Yet the appearance that the President was claiming a prerogative to subvert on-the-record adjudication was the very difficulty that seemed to contribute so strongly to the Court's

being able to block the release of a CRC report critical of his policies because of the Commission's "independence." Implicit in this inability was an opportunity to consult with and try to persuade the Commission. *Id.*

316. See *supra* text accompanying notes 97–112.

317. The Marine Mammal Protection Act of 1972, 16 U.S.C. § 1379(d)(2) (1982), exempted certain rules promulgated under the Act by the Secretary of the Interior from Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981) (reprinted in 5 U.S.C. § 601 note (1982)), the Regulatory Flexibility Act, 5 U.S.C. §§ 601–612 (1982), and the Paperwork Reduction Plan Act of 1980, 44 U.S.C. §§ 3501–3520 (Supp. V 1981). The President responded to this direct assault on executive authority by invoking inherent executive power to achieve the control equivalent to that provided under the inapplicable statutes and authority. Statement on Signing H.R. 4084 Into Law, 17 Weekly Comp. Pres. Doc. 1111 (Oct. 9, 1981); see Verkuil, Symposium on Presidential Control of Rulemaking: An Introduction, 56 Tul. L. Rev. 811 (1982).

318. See *Kalaris v. Donovan*, 697 F.2d 376 (D.C. Cir.), cert. denied, 103 S. Ct. 3088 (1983) (no structural argument to prevent removal without cause from on-the-record decision responsibilities).

denial of the executive function in *Humphrey's Executor*.³¹⁹ Some basis upon which to support a congressional judgment defeating such a claim seems essential for judicial acceptance of the results of such adjudications.

Such an argument might be constructed along other than structural lines, relying on the claims for fairness inherent in the separation-of-functions model. The assertion would be that Congress could determine that one constitutional claim (the President's power to require an opinion in writing) had been trumped by another, the litigant's claim to a decisional process freed from the suspicion of improper influence.³²⁰ The argument would be tenable, however, only if Congress had made clear that its objective was to create an apolitical process. And the argument would be no different if made respecting the judicial officer of the Department of Agriculture than if made about the Securities and Exchange Commission. In either case, Congress would have to pay a considerable price, its own abstention from efforts at political direction or else raise significant problems from a checks-and-balances perspective.³²¹ This approach allows us to avoid the necessity of having to say that an agency exempt from the opinion in writing mandate is "in" the article III judiciary,³²² or anywhere else in government. Yet it still permits Congress to establish such an agency provided that the agency remains firmly within constitutional controls and as long as the provisions made for it suggest no unbalancing of the intended tensions among the government's political branches.

3. "*Take Care that the Laws Be Faithfully Executed*". — As Professor Corwin³²³ and others³²⁴ have noted, the Delphic responsibility of the President to "take Care that the Laws be faithfully executed"³²⁵ does not tell us whether the President has authority to direct the affairs of government beyond that which statutes confer. What is important to note, however, is that the uncertainty is not unlimited. Whether this phrase implies that the President is to be a decider or a mere overseer, or something between, it requires that he have significant, ongoing relationships with all agencies responsible for law-administration. The unitary responsibility thus expressed, and sharply intended,³²⁶ does not admit relationships in which the President is permitted so little capacity to engage in oversight that the public could no longer rationally

319. See *infra* text accompanying notes 333-46.

320. Compare the Court's reasoning in *United States v. Nixon*, 418 U.S. 683 (1974), discussed *supra* text accompanying notes 174-76.

321. See *supra* text accompanying notes 149-215.

322. As we know, *Crowell*, *Humphrey's Executor* and *Northern Pipeline* notwithstanding, it is not.

323. See E. Corwin, *supra* note 74, at 3-5.

324. The argument that the President himself may exercise the discretion statutorily delegated to others, see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring), seems to render much of the remaining text of article II superfluous, and the President's personal authority unworkably large. See also Ledewitz, *supra* note 125, at 763-70, 788-93.

325. U.S. Const. art. II, § 3.

326. See *supra* text accompanying notes 97-101.

believe in that responsibility. The charge to "take care" implies that congressional structuring must in some sense admit of his doing so. An effort, then, to establish an agency over which the President's control went no further than the power to appoint its heads should be found deficient.

The proposition that Congress must allow some scope for presidential oversight of any law-administrator does not preclude its choosing by statute to place the responsibility for decision in a department rather than the President. Thus, primary responsibility, as well as the capacity, for detailed decision-making properly lie in the agencies to which rulemaking is assigned. Both agency decisionmaking and presidential oversight of an agency's performance may take into account only those factors that the statutes establishing them permit as relevant.³²⁷ Since the Constitution does not itself resolve the tension between President as administrator and President as political counterweight to Congress,³²⁸ a court would be hard pressed to deny Congress the choice in a particular setting of treating him as administrator.³²⁹ That assignment is itself a part of the law to the faithful execution of which the President must see. If, for example, EPA or OSHA is statutorily forbidden to consider economic cost as an element in a safety decision, that statutory preclusion is part of the law to be executed and consequently a constraint on its execution—for the President, as well as for the responsible agency.³³⁰ Presidential participation, like agency decision, seems possible only within the area of discretion that a particular law establishes. In any event, the President has only those resources Congress chooses to appropriate to him,³³¹ and these are insufficient for him to make the detailed substantive decisions required by the statutes.

However, the presidential oversight function must in some sense be recognized; even an administrator has power and is not merely a clerk. Significant possibilities for legitimate presidential involvement can be identified and in fact appear to make up the bulk of presidential intervention efforts: seeking and providing information to promote coordination and awareness of national policy issues affecting law execution, requiring analysis or responses on matters suggested by national policy concerns relevant to the agency's charge, or directing that given perspectives be further considered within the framework of relevance established by the agency's organic statutes. All these

327. See, e.g., *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981).

328. See *supra* text accompanying notes 102-12.

329. Perhaps a different question would be raised by congressional measures so thoroughgoing that they seemed to fix the President's character as administrator across the board—thus resolving an intended tension.

330. See *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 509 (1981). An indication that costs were considered would be the occasion for a summary reversal on judicial review of the resulting rule. See *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972); *Texas Medical Ass'n v. Mathews*, 408 F. Supp. 303 (W.D. Tex. 1976); *Florida Dep't of Health & Rehabilitative Servs. v. Califano*, 449 F. Supp. 274 (N.D. Fla.), *aff'd mem.*, 585 F.2d 150 (6th Cir. 1978), cert. denied, 441 U.S. 931 (1979). Senate Comm. on Government Operations, Study on Federal Regulation, Vol. II: Congressional Oversight of Regulatory Agencies, S. Doc. No. 26, 95th Cong., 1st Sess. (1977).

331. See *supra* note 118.

actions are consistent with the statutory assignment of decisional responsibility to the agencies, the President's resources and vantage point, and his obligation to "take care" that *all* laws are faithfully executed. None need compromise the ultimate decisional authority of the responsible agency or disregard the factors that Congress may have identified as relevant to its decision by implying a substitution of presidential for agency judgment.³³²

B. The Requirement that Congress Observe Parity in Political Oversight

The Constitution and the structural judgments it embodies require, at a minimum, that Congress observe a rule of parity in providing for political oversight of any government agency it creates. Congress cannot favor itself in providing for political oversight of an agency that administers, as well as assists in the formulation of, its laws. A rule that presidents may not, but members of Congress may, seek to bring political influence to bear on the policymaking of any agency directly affronts the framers' purposes,³³³ and serves no apparent function beyond aggrandizement of congressional power at the expense of the President's. Members of Congress are as capable as presidents of making excessive telephone calls or passing on private views under the guise of policy guidance, and often have done so; congressional hearings, for example, are used at sensitive stages of policymaking as instruments of coercion as well as of inquiry.³³⁴ Yet Congress's constitutional *raison d'être* is not to oversee the execution of laws; it is to enact new laws as required. Political pressure from the Congress or its members, is, if anything, *more* objectionable than similar pressure coming from the White House.³³⁵ At the least, the judgment that policymaking should not be subject to political direction must apply for congressional as well as presidential pressures. To conclude otherwise is to reverse the Convention's central decision about the Presidency.³³⁶

332. The distinction between supervision and substitution is one reasonably well understood, if not invariably practiced, by courts as well. In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), the Court piously states that it is supervising only: "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."

333. The willingness of the drafters to see Congress begin its annual session as late as the first Monday in December, U.S. Const. art. I, § 4, cl. 2, is itself evidence that an active presidency was expected.

334. *American Pub. Gas Ass'n v. Federal Power Comm'n*, 567 F.2d 1016, 1069 (D.C. Cir. 1977), cert. denied, 435 U.S. 907 (1978); *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977); *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir.), cert. denied, 405 U.S. 1030 (1972).

335. The President, unlike Congress, has independent authority deriving from the constitutional text and his position as chief executive to bring his (political) viewpoint to agency decision-making. See *supra* text accompanying notes 295-332.

336. See *supra* text accompanying notes 96-100. Support for the general idea that Congress and the Executive have a mutual duty to acknowledge and reconcile each other's important constitutional obligations can be found in *United States v. American Tel. & Tel. Co.*, 567 F.2d 121, 127-31 (D.C. Cir. 1977); see also *United States v. House of Representatives*, 556 F. Supp. 150, 152-53 (D.D.C. 1983).

Consider in this light an aspect of the pre-*Chadha* debate over the legislative veto that put the prevailing myths about independent and executive agencies in sharp relief. The White House at one time suggested that the legislative veto was objectionable only if rulemaking authority had been placed "in" the executive branch, and had thus unilaterally invaded the President's article II authority to execute the laws.³³⁷ Under this argument, the legislative veto would not be objectionable if Congress could have kept the delegated rulemaking authority entirely away from the executive branch, say, by placing it in an independent agency. Because rulemaking had thus been made a "legislative act," the argument went, a legislative veto respecting FTC rules was said to be less open to objection than one applying, say, to rules adopted by the Department of Education.

The argument seems precisely backwards, because it fails the parity test. The strongest argument made in support of the legislative veto—the one I have argued ought still to prevail in the context of direct presidential action in the arena of political action³³⁸—arises in those cases in which the initiative subject to the possibility of veto is actually the President's. The President's involvement assures parity,³³⁹ and thus makes it possible to say that "the possibility of undue legislative encroachment—the focus of the Framers' stress on the veto power—is minimal."³⁴⁰ If the President cannot himself control the promulgation of the rule because, for example, it is the product of an "independent regulatory commission," then law has been changed through a process redolent of congressional political control and requiring congressional approval, without presidential participation; an engine for avoidance of the veto in the formulation of statutory policy has been created.

The need for parity can be further illustrated by referring to an obscure and lapsed authority of government, the Cost Accounting Standards Board (the CASB). This body was established to devise a standard body of accounting principles for use in all negotiated defense contracts.³⁴¹ Such contracts constitute over ninety percent of the total number of government contracts, and standard principles were thought likely to result in substantial cost reductions. Because executive branch officials were regarded as subject to political

337. The current Administration offered a compromise to congressional committees considering a general legislative veto statute: the President would not object to a statute that reached only rules of independent regulatory commissions. See Hearings, *supra* note 76, at 7.

338. See Strauss, *supra* note 5, at 806.

339. That is, in this setting the legislative veto scheme most closely approaches practical equivalency to ordinary legislation; unless Congress (by failing to veto) and the President (by permitting a proposal) agree that a new rule is to take effect, the law remains as it was before; the concurrence of all three is required to effect a change. In the regulatory setting, however, other problems remain. See Strauss, *supra* note 5, at 808-09.

340. *Atkins v. United States*, 556 F.2d 1028, 1065 (Ct. Cl. 1977) (*per curiam*), cert. denied, 434 U.S. 1009 (1978).

341. 50 U.S.C. app. § 2168 (1976); see generally Cost Accounting Standard Board, 1979: Hearings on ? Before Comm. on Banking, Housing, and Urban Affairs, 96th Cong., 1st Sess. (1979).

and contractor pressures, and had not in fact succeeded in developing a body of agreed accounting principles, Congress established a five-member board under the chairmanship of a congressional official, the Comptroller of the United States, to develop rules to take effect unless disapproved within a stated brief time by Congress.³⁴² Once promulgated the rules were administered by the Defense Department. Departure from Board standards resulted in the imposition of a penalty on the contractor, a result indistinguishable from what would have occurred if Congress had adopted the standards by statute. The standards were adopted following procedures resembling ordinary informal rulemaking under the Administrative Procedure Act, but the Board's work was excluded from all provisions for judicial review; once adopted, the standards lay before the Congress for sixty legislative days and took effect unless disapproved by concurrent resolutions.

One might think that these arrangements would fall under the weight of *Buckley's* reasoning respecting the appointments power, although the Court has left in place a contrary judgment of the Court of Claims.³⁴³ But even if one assumes the appointments provisions might be sustained,³⁴⁴ serious questions about the manner in which the agency was to conduct its rulemakings remain. The agency is completely severed from presidential control, but remains under close political control by Congress; it enacts rules that govern governmental contractors and the Department of Defense alike, and even the possibility of judicial review of the resulting standards appears to have been excluded. Such a mechanism, if permitted here, would quickly teach Congress how to avoid presidential controls, and would sacrifice the unitary character of the Presidency. In asserting for itself political connections denied the

342. 50 U.S.C. app. § 2168 (1976). The Comptroller originally opposed placement of this "executive branch function" in his agency, the General Accounting Office, but later expressed satisfaction that the Board had been able to remain free of political pressures that would have distorted an executive order. Cost Accounting Standards Board, 1979: Hearings on ? Before Comm. on Banking, Housing, and Urban Affairs, 96th Cong., 1st Sess. 63-64 (1979).

343. *Boeing Co. v. United States*, 680 F.2d 132 (Ct. Cl. 1982), cert. denied, 51 U.S.L.W. 3756 (U.S. Apr. 12, 1983). Under the Cost Accounting Standards Act, 50 U.S.C. app. § 2168 (1976), the CASB's standards "shall be used by all relevant Federal agencies and by defense contractors and subcontractors." 50 U.S.C. app. § 2168(g) (1976). The Court of Claims held that regardless of either the constitutionality of the act, or the Defense Department's mistaken assumption that the law compelled it to adopt the standards, the adoption of the standard by the department was valid, whatever the departmental motivation for doing so. *Boeing Co. v. United States*, 680 F.2d at 141.

344. It might be argued that by placing appointive authority in the hands of the Comptroller General, Congress sought to use its article II authority to "vest the Appointment of such inferior Officers, as they think proper, . . . in the Heads of Departments." U.S. Const. art. II, § 2, cl. 3. The Comptroller General, although an official of Congress, is appointed by the President with senatorial consent for a term of years made unusually long in an effort to assure independence. The argument that he could be regarded as the "head" of the Cost Accounting Standards Board, a separate statutory agency, is placed in some doubt by the circumstance that his authority on the CASB concerning its one substantive responsibility (the generation of standards) was identical to that of his fellow board members. The vote of each counts equally; no other commission or board treats members as "inferior officers" subject to the chairman's appointive authority.

Presidency over an organization charged with law-administration, the Congress signalled the gravest of insults to the constitutional scheme.

This proposition about parity is not an especially strong one. In particular, so long as Congress does not treat itself more favorably than it does the President, the parity notion does not preclude a congressional judgment that some agency policymaking should not be subject to political direction by the President. From this perspective, the "independent agency" may simply reflect an ordering of governmental function that Congress would be free to extend to most if not all government.³⁴⁵ Government officials who are not heads of departments may be placed in the Civil Service, remote from presidential discipline, even though Congress could not insist on having an opportunity to approve their removal. Nonetheless, the acceptance of a requirement of parity in political oversight would establish an outer limit susceptible of both understanding by the Congress and application against it. That congressional understanding, in itself, might be thought likely to influence congressional judgments about the extent to which political controls would be warranted in a given situation.³⁴⁶ In creating "independent" agencies, Congress would have to give up the notion that "they are ours." Acceptance of this reasoning, by requiring acts of self-denial, should constrain the frequency with which the judgment to create agency independence is in fact made. If one can imagine circumstances in which freeing a governmental body from some or all political controls would be inappropriate, one can equally imagine substantial political hurdles to any such outcome.

C. The President's Claim to Effective Communication

One of the requisites of even a minimal oversight relationship, confirmed as we have seen in the opinion in writing clause, is a channel of communication with the agency being overseen, communication which—at least absent special justification—may be conducted in private and maintained as confidential. Absent the capacity to talk effectively, the oversight relationship and the intended political responsibility that attends it could hardly be said to exist. This is not the place for a general essay on executive privilege, but some

345. As already noted, *supra* note 11, defense and foreign affairs functions are special; the measure of congressional control over domestic law-execution is far larger. Its breadth is illustrated by the plurality reservation in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), discussed *supra* text accompanying notes 219-35, of the question of an express congressional provision for presidential tort liability.

346. To Mark Rosenberg I owe the observation that the characteristic differences in these political controls will render complex any assessment of the balance between them. Congressional oversight and appropriations hearings have an institutional character associated with legislation, as presidential controls are an outgrowth of executive discretion. The differences ought not to be surprising and reflect the vitality "separation of powers" does have as applied to the named actors of the Constitution. That apples and oranges are not strictly commensurable, however, does not negate a proposition that if one is on the plate in abundance, so must be the other.

broad features should be noted in preparation for a limited discussion of congressional prerogatives of control.

1. *Executive Privilege as a Claim Applicable to All Law-Administrators.*

— The claim to executive privilege, often enough disputed in particular applications, is nonetheless generally recognized. *United States v. Nixon*³⁴⁷ acknowledged its constitutional dimension, even while holding that in specific instances it might be overcome. A similar proposition underlies long-standing judicial assertions—again, susceptible of being overcome—that the decision processes of law-administrators are not to be inquired into on judicial review,³⁴⁸ and that the fifth exemption to the Freedom of Information Act,³⁴⁹ which in effect embodies the more general notions of executive privilege, should be read as accepting that privilege. “Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision-making process.”³⁵⁰ Congress’s enactment of that exemption—as its general acknowledgment of a presidential claim to privacy of communication with officers of government that may be overcome only on its demonstration of a specific need for legislative purposes³⁵¹—signals its own acceptance of the general principle.

Perhaps it will be thought that the more general form of executive privilege—that which protects the decisionmaking process as distinct from national secrets of defense or foreign relations³⁵²—is limited in its provenance

347. 418 U.S. 683 (1974), discussed *supra* text accompanying notes 174–76.

348. *United States v. Morgan*, 313 U.S. 409 (1941), requires a strong showing of bad faith or improper behavior to go behind administrative findings made. See *Camp v. Pitts*, 411 U.S. 138 (1973).

349. 5 U.S.C. § 552(b)(5) (1982); see also *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 137 & n.2 (1975) (exempting “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency”).

350. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150–51 (1975) (quoting *United States v. Nixon*, 418 U.S. at 705).

351. Whether Congress is obliged to accept particular claims of executive privilege is, of course, an entirely different matter; as in *United States v. Nixon*, the President is unlikely to be left as the final judge of the matter. Nonetheless, as in the recent imbroglio over such claims leading to the resignation of Anne Burford Gorsuch, President Reagan’s Administrator for the Environmental Protection Agency, see *N.Y. Times*, Mar. 10, 1983, at B12, col. 1, these issues tend to be compromised in political give-and-take—both sides perhaps realizing that there is much to be lost from the definitive judicial resolution that ultimately might otherwise be required. The fact of that play in the joints, again, is a central indicator of the health of the constitutional scheme: if the outcomes were or could be one-sidedly foreordained, the implication would be an incapacity on the part of the President to check the Congress or vice versa.

Congressional need must in any event be demonstrated to obtain judicial enforcement. See *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927); Senate Select Comm. on Presidential Campaign Activities v. *Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974); Fein, *Fighting Off Congress: A Bill of Rights for the Independent Agency*, 8 *District Law.* 37 (Nov./Dec. 1983).

352. The scope of executive privilege parallels the range of executive function. As a general matter, claims that information might compromise military or foreign relations interests of the nation have greater weight, and are less easily overcome, than claims that making public some

to the body actually deciding. That is, an agency to which Congress has delegated a decisional function might be entitled to protection of its own decisionmaking processes, but communications from the outside—specifically from the President—would be within the ambit of a proper claim of privilege only if the President were himself entitled to decide the matter and hence internal to the decision process. The basis on which a functional argument of that sort could be made for decisions of protected objectivity has already been indicated;³⁵³ as a general matter, however, the argument encounters the difficulty that the constitutional basis for the claim of executive privilege inheres in the Presidency itself—indeed, a requirement that the President himself authorize any claim of executive privilege formally made to Congress or the courts is generally accepted.³⁵⁴

As with the legislative veto and the independent regulatory commissions, a curious position taken by the White House (in this case during the Carter Administration) may serve to illustrate the problem of limiting privilege only to "executive" personnel.³⁵⁵ Congress was considering legislation to regularize the procedures for asserting executive privilege and, as it usually does, the Office of Management and Budget sought comments from all agencies, including the independents, on the proposal. The bill in question required a presidential assertion of privilege, and made no provision for claims by or on behalf of the independents. The NRC's responsibilities for nuclear materials safeguards and export licensing had resulted in its having possession of a substantial body of sensitive foreign relations and intelligence information, information subject to the stronger form of executive privilege claim, and it seemed appropriate that it be brought within the umbrella of the procedures being established. A comment recommending such an amendment was proposed. The view from the Department of Justice, however, was that because the NRC was independent it could not hope to have the privilege available to it, and therefore the comment should not be made.

Viewed as a political judgment about what positions the administration could afford to take with the Congress, this advice is no different than the decision not to impose the cost-benefit analysis regimes of Executive Orders 12,044 and 12,291 upon the independent commissions.³⁵⁶ As a legal analysis, however, it is extraordinary. The information in question was no less sensitive

internal dialogue about law-administration will impair the President's capacity to secure candid advice from his associates. This difference is well reflected in the wording and interpretation of exemptions 1 and 5 of the Freedom of Information Act, 5 U.S.C. §§ 552(b)(1), (5) (1982). See W. Gellhorn, C. Byse & P. Strauss, *supra* note 2, at 592-93; *supra* note 11. We are here concerned with the latter form of claim.

353. See *supra* text accompanying notes 315-16.

354. Failure to recognize that his argument is inconsistent with the Constitution's vesting executive authority in a single President is the principal flaw in the otherwise perceptive discussion appearing in Fein, *supra* note 351.

355. I learned of this incident, as a number of others, during a period of service as General Counsel to the Nuclear Regulatory Commission.

356. See *supra* notes 76-78 and accompanying text.

nationally in the NRC's hands than it had been in the hands of the Department of State; it concerned issues of high controversy, respecting which congressional demands were readily anticipable. To deny the possibility of a claim of executive privilege seems also to deny any obligation to the President on the agency's part to hold the matter in confidence. The implication, again, is that Congress has succeeded in fractionating government, producing law-administrators not related to the President in a way that permits recognizing in him the (politically enforceable) obligation of taking care that the laws be faithfully executed, and creating oversight relationships for itself with law-administrators in which the political resistance expected and generally forthcoming from the Presidency would be missing. If executive privilege is the President's, and it is in the Presidency that it has its constitutional source, then privilege is a relationship that must extend throughout all law-administration.

2. *Congressional Regulation of Executive Privilege.* — As *United States v. Nixon* underlines, the fact of executive privilege does not in itself establish the President's right to hold communications to him (or within the executive branch) confidential. Claims to acquire the information subject to the privilege or to deny confidentiality to consultations may equally be based on the Constitution, and in particular cases may be stronger than the privilege claim. The *Nixon* Court indicated that balancing judgments were required, finding there that a special need urged on behalf of criminal defendants overcame what was presented as a blanket, generalized claim of privilege made on the President's behalf.³⁵⁷ It was argued above, along similar lines, that a presidential claim of constitutional prerogative to communicate in private with a decisionmaker could be overcome by a congressional judgment that a given decision must be made "on the record" to assure its objectivity.³⁵⁸

Congress might have other reasons, apart from motives of power aggrandizement, to limit presidential communications to the agencies to which it had delegated decisional responsibilities, or to require any communications to be made publicly. While ostensibly the purpose is to communicate presidential views, such communications might be a means for injecting the views of politically influential private parties (the conduit problem). Communications are more often made in the name of the President than by the President himself, and Congress might believe that having staff persons making them presented unacceptable political risks or diffusion of authority (the staff abuse problem). Even outside the context of on-the-record proceedings, these risks, on the whole, could be thought to outweigh the gains to be had from informal and confidential lines of communication within the administration. This problem arises most acutely in the context of informal rulemaking, where it has already had a fair amount of focussed attention.³⁵⁹ Those analyses suggest both that wide scope exists for congressional judgment on the problem and—

357. See *supra* text accompanying notes 172-74.

358. See *supra* text accompanying notes 317-21.

359. See, e.g., Verkuil, *supra* note 55; Bruff, *supra* note 47; Nathanson, *supra* note 207.

what might be regarded as the parity-driven consequences of a judgment favoring controls—that it would be difficult to adopt more formal standards without making rulemaking far more cumbersome. Are there limits on Congress's authority to make and enforce such judgments?

a. *The Conduit Problem.* — The allegation that private presidential (and congressional) communication had permitted back door influence by special interest groups was a principal objection of the parties in *Sierra Club v. Costle*,³⁶⁰ a well-regarded D.C. Circuit decision reviewing the highly significant EPA rulemaking on sulfur emissions by coal-fired electric utilities.³⁶¹ Environmental groups feared that politically more powerful coal interests were having their views passed directly along, in private, as if they were the views of the President, or at least with the command that they receive respectful attention. National coordination can be understood as a rationale for presidential participation; serving as a conduit for the views of special interest groups in particular cases presents greater difficulties.³⁶² In *Sierra Club*, the court was able to rely on advice the Attorney General had given White House officials that their ability to consult with agency officials on rulemakings might depend on their undertaking not to serve a pass-along function,³⁶³ and that they should keep and make public records of materials they received from private sources to show their adherence to that undertaking. Because that advice appeared to have been followed, the court found the consultations not legally objectionable.³⁶⁴

While it recognized the constitutional stature of the claim of both "the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy,"³⁶⁵ the D.C. Circuit in *Sierra Club* also appeared to recognize the scope for judicial and legislative regulation of that power. It hinted that courts might inquire, using the discovery weapon, whether "conduit communications" had occurred. In the context of the Attorney General's advice and its apparent acceptance, however, it declined to authorize that step "simply on the unsubstantiated hypothesis that some such communications may be unearthed thereby."³⁶⁶ A presumption of

360. 657 F.2d 298 (D.C. Cir. 1981).

361. That rulemaking was also the subject of an extraordinary case study demonstrating (and decrying) the penetration of politics into the outcome. B. Ackerman & W. Hassler, *Clean Coal/Dirty Air* (1981).

362. See also, e.g., *In re Permanent Surface Mining Regulation Litigation*, 617 F.2d 807, 809 (D.C. Cir. 1980) (per curiam) (appeal from denial of preliminary injunction); Bruff, *supra* note 46, at 466 (National Highway Safety Administration).

363. 657 F.2d at 405 n.520.

364. *Id.* at 407-08; see also 44 Fed. Reg. 1355 (1979); Dep't of Justice Memorandum to Cecil D. Andreu, Jan. 17, 1979, reprinted in *Legal Times of Wash.*, Jan. 29, 1979, at 32, col. 1.

365. 657 F.2d at 405.

366. *Id.* at 405 n.520. It might be noted that the Reagan Administration has taken a less formal view, only advising officials to make sure persons who make contact with them have placed in agency files any factual data they mean to present, and making no effort to preserve a paper trail. See, e.g., Hearings, *supra* note 76, at 47 (Testimony of James Miller, then Director of the President's regulatory reform effort and now Chairman of the FTC):

regularity would first have to be overcome, in light both of general hesitation to put agency motivation on trial³⁶⁷ and of the "extraordinary caution" courts should employ when article II considerations are present.³⁶⁸ And while the court seemed to indicate that a statutory requirement of disclosure would be enforced,³⁶⁹ it also anticipated that such a statute would have to respect the need for parity. Congress could "convert informal rulemaking into a rarified technocratic process, unaffected by political considerations,"³⁷⁰ but at the cost of confining congressional as well as presidential power.

Thus, Congress's broad authority to adopt legislation to structure the behavior of the President and agencies cannot be considered independently of the same constitutional concerns as motivated the *Sierra Club* court to decline to intervene. The argument for controlling intra-executive contacts depends on viewing rulemaking as an apolitical process, like a trial, in which decision turns on the outcome of a public contest over facts, rather than on intuition and judgment based on experience in the community. That vision is tenable, but has several shortcomings. First, it represents a sharp departure from current understanding, and implies an equal constraint for Congress. Second, it may not reach past the conduit issue, or is at least far weaker respecting expressions of official views. Third, and most important, significant difficulties would arise if Congress sought to go beyond requiring contacts to be made public, to a prohibition of presidential contacts. A requirement of openness would satisfy procedural if not structural concerns: it would supply a full record for judicial review, and full appreciation in the community of the data on which the agency has relied; it would also provide a means for checking

As you can see, the basic principle is that any factual information given to OMB and the task force should also be transferred to the agencies to be included in their rulemaking files. Furthermore, any time we procure facts or perform analyses based on such facts which impact on our consultations with agencies, we also transmit such information for inclusion in the record.

See also *id.* at 102 (OMB has no intention of maintaining a log of contacts); General Accounting Office, Report to the Chairman, Senate Comm. on Governmental Affairs, Improved Quality, Adequate Resources, and Consistent Oversight Needed if Regulatory Analysis is to Help Control Cost of Regulations iv, 52-54 (Nov. 2, 1982) (criticizing OMB's *ex parte* contacts and lack of written comments); M. Eads, *The Crusade that Backfired* ch. 6 (forthcoming); Hearings, *supra* note 76, at 17 (June 11, 1981 memorandum from David Stockman entitled "Certain Communications Pursuant to E.O. 12291, Federal Regulation").

367. *Sierra Club v. Costle*, 657 F.2d at 405 n.520; See also *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *Morgan v. United States*, 304 U.S. 1 (1938).

368. *Sierra Club v. Costle*, 657 F.2d at 407. That is, recognizing the President's proper constitutional role, the court also recognized that permitting easy litigative intrusion would necessarily impair his exercise of that role.

369. See, e.g., 657 F.2d at 405-07.

We assume, therefore, that unless expressly forbidden by Congress, such intra-executive contacts may take place But in the absence of any further Congressional requirements, we hold that it was not unlawful in this case for EPA not to docket a face-to-face policy session involving the President and EPA officials during the post-comment period

370. *Id.* at 408.

that the pass-along function was not being served while substantially respecting the President's claim to consultation under the "opinions in writing" clause. It would be hard to reconcile a prohibition of presidential contact either with that provision, or with the general purpose to make of the President a unitary chief executive.

Might not the President insist that policy advice at least, as distinct from factual assertions, remain confidential? Both written and oral opinions from the agencies, and any responses the President may make, have the character of communications about which executive privilege claims could be made, even though the claims would not invariably be respected.³⁷¹ Even apart from the risk of purposeful Congressional disruption of the balance of powers within government, any disclosure requirement must balance gains for judicial review or public acceptance against possible losses in the candor and flexibility of the government's decisional processes. Without attempting to resolve here the *United States v. Nixon*³⁷² balance, I would note that a sweeping and general congressional judgment about the benefits of openness for public acceptance of administrative acts does not present as precise a claim as a prosecutor's need in connection with a particular criminal proceeding. It neither embodies explicit constitutional values corresponding to the criminal defendants' assertions in that case nor reflects a particularized need to override the executive's claim to privilege. On the President's side, arguments of varying strength can be imagined: the argument against a requirement that outside contacts be disclosed—the conduit function—is evidently weaker than that against disclosing all contacts, even those from within; required exposure of factual submissions, less objectionable than required publicity for advice. On the congressional side of the ledger, one notes that statutory requirements of publicity have a greater tendency to defeat the intended tensions among the branches, by greatly reducing presidential power across a broad spectrum of activity, than does an issue-specific judicial determination that a presumptive privilege has been defeated. Certainly, given the President's constitutionally based claim for confidential consultation with law-administrators, Congress could not expect to require openness for presidential communication only. If it required all presidential communications to be open without equally requiring that of congressional communications, the suspicion would be inescapable that an assault on the Presidency, rather than an assurance of fair or acceptable procedure, was at the root of the measure; and accordingly, it ought not survive.³⁷³

371. See Bruff, *supra* note 47, at 505; Verkuil, *supra* note 55, at 958-59.

372. 418 U.S. 683 (1974).

373. A similar issue, respecting which even stronger doubts might be raised, is suggested by a proposal discussed in connection with recent regulatory reform legislation to prohibit any officer of the United States from requiring independent commissions to submit legislative proposals (or testimony or comments) for executive branch coordination prior to their submission to Congress. The President may not only require opinions in writing on any subject; he is also to recommend the legislation he judges necessary and expedient. The proposed constraint significantly hampers

Could Congress require the President to participate only in the ordinary course, making any comments or advice be filed not only openly but also within the time frame allotted for public participation?³⁷⁴ Again the values beyond interbranch warfare to be served by such a requirement, such as the facilitation of judicial review, require at least that the same constraints be placed on congressional interventions.³⁷⁵ The President's responsibility to coordinate the activities of all government, however, sets him apart from private and congressional actors. The responsibility cannot be well exercised unless he, as well as the responsible agency, is in a position to assess the various responses made in the rulemaking and even the agency's preliminary reaction to those responses. Congressional imposition of strict time requirements, then, could require a burden of justification beyond that to be faced in supporting a requirement of openness.

b. *The Staff Abuse Problem.* — In addition to the conduit problem are the difficulties introduced by the fact that not all views attributed to the President, even views emanating from the White House, are in fact his. Junior staff members may be anxious to satisfy imagined desires of the President, knowing that he does not have the time to be consulted on all issues. Less creditably, they may be eager to demonstrate their power to the outside world. Of course the officials at the other end of the telephone line know that "the President wants" is not always meant literally; yet the cost of testing the waters can be high. Aware of these potentials for misunderstanding, if not abuse, might Congress provide that presidential prerogatives of participation must be exercised personally?

We saw earlier that one result of *Nixon v. Fitzgerald* was a sharp distinction at the level of quasi-constitutional prerogative between the President and even close "elbow-aides."³⁷⁶ If a similar distinction were employed in this context, it would permit the restriction suggested—in the process, effectively denying the President the capacity to perform his functions by precluding him

his ability to do so by effectively depriving him of the possibilities of consultation and coordination. A requirement that agency proposals be revealed with the President's package, like the equivalent requirements now common respecting budget requests, would not raise these issues; nor would a provision requiring the agency to wait only a reasonable time before making its submission. Either of these measures would also restrict the President's political authority with the agencies concerned; the difference lies in their preservation of his leadership and initiative.

374. Dean Verkuil, discusses this issue, Verkuil, *supra* note 55, at 985, and recommends:

There should be no requirement that these written contracts be submitted in accordance with the timeframe established for public comment, but they should be placed in the record before the rule is finally promulgated. Limiting contacts to the public comment period would reduce the value of public comments to the agency and to the executive branch. Post-comment contacts are important precisely because they are informed by the comment period itself.

Id. at 987-88 (footnoted omitted).

375. Acceptance of that proposition could well make use of this option more sparing—limited, for example, to rulemaking conducted on the record, where the judgment that apolitical approaches are required is strong.

376. See *supra* text accompanying notes 219-31.

from delegation. This result is troubling. Even the most sensitive issues of national security must be brought to the point of presidential decision by staff, who assemble data and views, and then winnow and shape them for the President, often after energetic and even oppressive consultation with the responsible agencies and departments. Presidential interventions in agency proceedings will almost always be performed by someone other than the President, acting in his name. The Constitution embraced the President's political accountability as an officer whose performance might be measured by the electorate—a concept consistent with delegation, so long as he may fairly be held to account for the delegates' performance. Indeed, anticipated delegation is the point of the cryptic references to "Departments." And the near-impeachment of Richard Nixon dramatically confirmed the reality of that responsibility.³⁷⁷

Such a constraint on presidential action would not meet the test of parity unless congressmen equally constrained their own staffs. The political cost to Congress of taking such a step, given the apparent importance of "casework" and oversight for legislators' priorities,³⁷⁸ would almost certainly preclude it *if* the parity notion applied. Yet the Court's reasoning in the *Fitzgerald* cases³⁷⁹ suggests it does not. The presidential aides in *Harlow* had relied for their claim of absolute privilege on *Gravel v. United States*,³⁸⁰ a case involving assertions by a Senator and his aides of privilege under the speech-or-debate clause of the Constitution.³⁸¹ The *Gravel* Court had said in dictum³⁸² that the clause "applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself."³⁸³ In the *Fitzgerald* cases, only the Chief Justice accepted the evident parallel to *Gravel*, and he noted it in terms too sharp to pretend his eight colleagues had not rejected it. One may say the Court erred, or that its judgment was affected by the particular executive conduct alleged in the *Fitzgerald* cases, or that the difference between qualified and absolute privilege is not so substantial as to impair the President's capacities to maintain his office and to remain an effective political competitor to Congress. Yet if Congress can legislate that it may, but the President may not, employ staff to

377. Dean Verkuil suggests a hierarchical approach, distinguishing interventions by the President himself from interventions by senior White House officials, and the latter, from interventions by staff aides. Verkuil, *supra* note 55, at 987-88; see also Roads to Reform, *supra* note 55, at 155-57 (dissenting remarks of former Secretary of Transportation William T. Coleman, Jr.). The distinction is an attractive one but its effect, again, is essentially to deny the possibility of delegation.

378. R. Arnold, *supra* note 72, at 26-27; M. Fiorina, *Retrospective Voting in American National Elections* 204-10 (1981); Fiorina & Noll, *supra* note 72, at 256.

379. See *supra* text accompanying notes 221-23, 233-37.

380. 408 U.S. 606 (1972).

381. U.S. Const. art. I, § 6, cl. 1.

382. It found the clause not properly invoked in the circumstances of the case. 408 U.S. at 622.

383. *Id.* at 618.

carry out oversight roles, the President's capacities both as chief executive and as political rival would be significantly undercut.

D. *The President's Constitutional Claim to Direct Agency Judgment*

The discussion to this point has largely assumed the proposition sometimes thought to have been settled by *Kendall v. United States*³⁸⁴ that Congress can if it wishes place administrative duties wholly in law-administrators, not subject to direction by the President. But *Kendall* resolves that issue only for settings in which administrators have no discretion.³⁸⁵ Granted that the agencies and the President are each bounded by law in their exercise of discretion, what directory authority does the President have *within* these boundaries?³⁸⁶ As in the inquiry into executive privilege, it may be useful to consider the issue in two aspects: first, whether in the face of congressional silence, presidential authority to direct or at least shape the exercise of law-administering discretion may be inferred; second, if so, whether any limits on congressional ability to override that direction by statute may be found. As in the case of executive privilege, it is not possible to be more than suggestive about a subject on which many have written.

1. *Presidential Direction of the Exercise of Administrative Discretion as a Claim Applicable to All Law-Administrators.* — Issues attendant to the President's claim to direct the exercise of administrative discretion are well posed by the increasing level of White House involvement in major agency rulemaking through the imposition of requirements to engage in economic analysis of the likely impact of proposed rulemaking, subject to possible White House review.³⁸⁷ President Carter's Executive Order No. 12,044, an initiative broadly supported by the legal community,³⁸⁸ first imposed this requirement in detail. The order created presidential review mechanisms essentially procedural in character; while further analysis or reports could be requested and the White House might call forceful attention to deficiencies thought to exist in agency drafts, the Order suggested no effort to direct how the rulemaking agency must exercise its judgment as to outcome, once a satisfactory analysis was in hand.³⁸⁹ President Reagan's Executive Order No. 12,291, issued soon after he took office, took the further step of imposing a

384. 37 U.S. (12 Pet.) 524 (1838), discussed *supra* text accompanying notes 127-30.

385. *Id.* at 609-14.

386. The concern is hardly a new one. See R. Cushman, *supra* note 140, at 680-88; E. Redford, *supra* note 167, at 12-33; Byse, *Comments on a Structural Reform Proposal: Presidential Directives to Independent Agencies*, 29 *Ad. L. Rev.* 157 (1977); Cutler & Johnson, *Regulation and the Political Process*, 84 *Yale L.J.* 1395, 1409-14 (1975).

387. See *supra* notes 75-77 and accompanying text.

388. See, e.g., *Roads to Reform*, *supra* note 55, at 79-88 (recommendations for increased presidential participation in rulemaking).

389. It is of course difficult—and was understood to be difficult—to enact a conclusion shown to be excessive, inefficient, or ineffective by an analysis that will be part of a rulemaking record; nonetheless, there was no mistaking whose judgment was to be exercised in that regard.

standard of judgment to be exercised on the basis of these analyses, "to the extent permitted by law": agencies were to adopt rules only if they were both cost-beneficial and benefit-maximizing.³⁹⁰ Although not formally applicable to the independent regulatory commissions, both executive orders were widely followed by them; both Presidents made clear that they had excepted the independents to avoid stirring up a political fuss, not because either believed he lacked authority to apply the order to the independents.³⁹¹

The stated rationale for these orders was not that the President might wish to substitute his judgment for the agency's on particular issues delegated to it, but that they would permit him to bring to bear balancing and coordination perspectives inseparable from the notion of a single chief executive. Acting on their own, agencies are most unlikely to achieve effective balance. Although the EPA, for example, could "take account of" the concerns of the NRC in adopting rules respecting radioactive wastes and the NRC, in turn, could consider the perspectives of the EPA, each would act from its own perspective. Uniformity of outcome would be unlikely even though both agencies would assert that they were taking account of the other's need and would be making genuine efforts to do so. Nor would either have authority to enforce its conclusion in the other agency. Such problems arise daily and may involve a significant number of agencies, each with its own perspective on a given regulatory issue or national problem. Interagency study groups proliferate, and each must have a chair. Memoranda of understanding are entered, and each agency must have an impetus to accommodate and some reason to expect enforcement of the result. Only the President can supply these services. Even where the courts might be called on to assist in resolution, their processes could take years that simply are not available to those responsible for implementing statutes today.

The power to balance competing goals—and the concomitant power to influence at least to some degree the agencies' exercise of discretion—can only be the President's; leaving the balancing functions in the agencies would create multiheaded government, government with neither the capacity to come to a definitive resolution nor the ability to see that any resolution is honored in all agencies to which it may apply. This outcome does not vary with whether the agencies are denominated independent or not. Once one has acknowledged that any discretion conferred must be exercised within the legal bounds set for it, failure to recognize the President's claim to shape its exercise would deny central premises of constitutional structure as sharply as would a denial of Congress's claim to set the legal bounds.

There are other practical reasons for granting the President the power to shape administrative discretion. Individual agencies almost necessarily lack the political accountability and the intellectual and fiscal resources necessary to achieve such balancing and coordination. Relying on them to do so would

390. Exec. Order No. 12,291, § 2, 46 Fed. Reg. 13, 193 (1981), reprinted in 5 U.S.C. § 601 note (1982).

391. See *supra* notes 75-77 and accompanying text.

produce more costly and less responsible government, in which interagency disputes would be more likely to arise and less amenable to abiding resolution. For example, the NRC, in order to carry out its responsibilities in the licensing of nuclear exports,³⁹² could simply accept the State Department's advice on the diplomatic aspects of proposed exports and the intelligence agencies' advice on the possible consequences of exportation for the proliferation of nuclear weapons. By statute, however, the NRC is required to reach independent judgments,³⁹³ and that has required it to develop its own miniature Department of State and intelligence-evaluation apparatus. Whether these offices are more expert than the agencies whose judgments they review is surely open to doubt; to say that the judgment of the officials in their charge is less likely to be influenced by extraneous factors may be another way of saying that they will not see or be responsible for all the implications of the judgments they are to make. What is certain is that these officials add to the bulk of government, to the time required to make decisions, and add to the volume of disputes government must resolve in order to act, as well as serving to diffuse governmental responsibility. In order to carry out the responsibilities placed upon them, they must seek additional information, question the judgments of those who supply that information, and in some instances disagree with these judgments. The result may, on balance, be improved decision; Congress, in establishing this mechanism, obviously thought the existing decisionmakers were too complaisant. The point here is to call attention to the costs of time, manpower, and added disputatiousness that must be paid to achieve those "improvements."

One response to arguments such as these is often couched in terms of the high political content of White House direction. Thus, urges former Secretary of Transportation William T. Coleman, Jr.,

I believe this analysis [in support of adopting formal procedures for presidential override of agency judgment] . . . overestimates the objectivity of the President's staff Many members of the White House staff also undertake single-mission objectives or bring with them, or learn on the job, program biases. . . . Even staff generalists often adopt specific issue orientations and are willing to sacrifice . . . conflicting . . . objectives in pursuit of whatever presidential priority has been assigned to them. Even more "ominous" is the so-called White House political advisor, whose role is never clearly defined in public but whose bias may be simply the position that will most ensure reelection of the President. . . . Such an advisor—immune from public scrutiny and congressional accountability

392. Nuclear Non-Proliferation Act of 1978, 42 U.S.C. § 2155 (Supp. V 1981). From 1975 until 1978 this authority was final, free of presidential direction; the law was changed in 1978 to permit the President to override the Commission's failure to issue the proposed license on a timely basis if he "determines that withholding the proposed export would be seriously prejudicial to the achievement of United States non-proliferation objectives, or would otherwise jeopardize the common defense and security." 42 U.S.C. § 2155(b)(2) (Supp. V 1981). The President's judgment, in turn, might be overridden by congressional action of a sort undermined by the decision in *Chadha*. *Id.*; see W. Gellhorn, C. Byse & P. Strauss, *supra* note 2, at 142 n.4, 642 n.1.

393. 42 U.S.C. § 2155(a)(2) (Supp. V 1981).

... and removed from the advice of experts in the bureaucracy—is not in a position to make a meaningful balancing choice among competing national goals.³⁹⁴

A second response is that the White House lacks the resources to make the detailed judgments inherent in administration. For example, in technologically complex rulemakings, like those at the EPA, many of the most important decisions are incorporated into the assumptions of the technological model used. The White House does not have the expertise necessary to comment on those rules and "without highly capable technical assistance to both resurface and reanalyze those assumptions, the review that is conducted . . . may end up being inconsequential and superficial but will have imposed a blizzard of additional paperwork by all concerned."³⁹⁵

While justified, these concerns underestimate the need for coordination and review and the inability of any body but the President to fulfill that need. "Each agency has a natural devotion to its primary purpose . . . no matter how many statutes . . . say that it shall 'consider' other interests as well. Someone in Government, and in the short run that someone can only be the President, must have power to make the agencies work together . . ."³⁹⁶ These claims made for presidential direction do not necessitate complete displacement of agency judgments or an assertion of White House expertise. Coordination and substantive suggestions—albeit backed up with the influence of the Presidency—are not incompatible with the agency remaining ultimately responsible for the decision. The OMB supervision of the impact-analysis process under Executive Order No. 12,291, for example, recognizes (as it must) that the authority to issue the rules subject to the impact analysis process remained in the agency head,³⁹⁷ subject to whatever political discipline

394. *Roads to Reform*, supra note 55, at 155, 157 (separate statement of William T. Coleman, Jr., dissenting in part from the commission's recommendations) (footnote omitted).

395. Hearings, supra note 76, at 28 (testimony of former EPA General Counsel Bernstein) (criticizing Exec. Order No. 12,291).

396. *Roads to Reform*, supra note 55, at 163 (separate statement of Judge Henry J. Friendly, concurring in part with the commission's recommendations). In his 1962 Oliver Wendel Holmes Lecture at Harvard, Judge Friendly had taken a position similar to that of Secretary Coleman. Compare H. Friendly, *The Federal Administrative Agencies: The Need For Better Definition Of Standards* 152-55 (1962) with *Roads to Reform*, supra note 55, at 155, 157 (separate statement of William T. Coleman, Jr., dissenting in part from the Commission's recommendations). In *Roads to Reform* Judge Friendly explained that those lectures had been

devoted solely to the independent agencies. . . . If they made a mistake in the award of a particular broadcast license, or even in its policies with respect to such licenses, the nation would survive until Congress took remedial action

The federal bureaucracy has burgeoned to an extent not remotely contemplated seventeen years ago. . . . Moreover, whereas in the early 1960's the focus was on agency decisions taking the form of orders after trial-type hearings, today's emphasis . . . [is] with regulations avowedly of a legislative character.

Roads to Reform, supra note 55, at 163 (separate statement of Judge Henry J. Friendly, concurring in part with the Commission's recommendations).

397. Exec. Order No. 12,291, § 3(f)(3), 46 Fed. Reg. 13, 193 (1981), reprinted in 5 U.S.C. § 601 note (1982).

the President might bring to bear.³⁹⁸ Similarly, *Sierra Club v. Costle*³⁹⁹ accepted the possibility that the White House had been able to influence the agency's choice among several alternatives, each supportable on the basis of the materials in the rulemaking, through private conversations it held could remain private.⁴⁰⁰ What had not happened was a direct transfer of decision; if Administrator Costle had decided not to accept any advice he received and promulgated the rule as he wished it to be, the White House's sole recourse would have been to punish him in some way, paying whatever political cost was inherent in that action. Within the constraint of recognizing the domain of law, the proposition that there exists a single executive, responsible to the people through election and to the law through his oath faithfully to execute all laws, locates the coordination and dispute resolution function in the Presidency.

2. *Congressional Regulation of Presidential Direction of the Exercise of Administrative Discretion.* — Given that the President's political accountability was foreseen as both a principal check upon him and a source of his authority in political struggles with Congress, the risk that political considerations might enter into the President's oversight of administrative discretion seems a limited rationale for congressional control of that oversight. At the least, for the reasons already indicated, one would think the rationale unavailable wherever Congress had not been equally careful of its own political involvement.

Just as with executive privilege, the key is to identify those congressional statutes that might unbalance the distribution of authority at the apex of government by crippling existing informal controls; there is no a priori need for statutory authorization of presidential direction. Although the recent proposals for presidential override of some important agency policy decisions⁴⁰¹ appear to be a dramatic innovation, the President's informal influence over the daily operation of government is already pervasive. In fact, these proposals would restrain rather than confer executive authority; the resolution of interagency dispute and coordination of agency activity in conformity with centrally determined executive policy are already daily activities. The activities are informal because informality makes for more efficient deployment of the President's limited resources; formalities mean time, people, and added disputes to be resolved. Such activities are not highly visible, because of the danger that, if they were, Congress would encumber them in ways restricting the effectiveness of the President's coordinative apparatus. The White House does not have to be explicit with an agency about results; it has enough power

398. Cf. *United States v. Nixon*, 418 U.S. 683, 694-97 (1974) (President's authority over Special Prosecutor limited by Department of Justice regulations granting him "unique authority and tenure").

399. 657 F.2d 298 (D.C. Cir. 1981).

400. *Id.* at 408.

401. See *Roads to Reform*, *supra* note 55, at 79-83; Cutler, *The Case for Presidential Intervention in Regulatory Rulemaking by the Executive Branch*, 56 *Tul. L. Rev.* 830 (1982).

to act much more indirectly using the points of contact already described: the opportunities to persuade and cajole; the loyalties that may arise from appointment; and the probable shared sense of respect and of national mission.⁴⁰²

In sum, Congress's ability to limit presidential directory power is limited not only by the general need to maintain a tension between the named branches, but by the need for the President to be able effectively to coordinate all agency decisionmaking. This need is reflected in the President's presently wide but informal directory power and Congress's acquiescence to it.

CONCLUSION

The basic conclusion was asserted at the outset: given the facts of contemporary government and the inescapable constraints of constitutional text and context, we can achieve the worthy ends of those who drafted our Constitution only if we give up the notion that it embodies a neat division of all government into three separate branches, each endowed with a unique portion of governmental power and employing no other. That apportionment was made, but it was made only as to those actors occupying the very apex of government—Congress, President, and Supreme Court. The remainder of government was left undefined, in the expectation that congressional judgments about appropriate structure would serve so long as they observed the two prescriptive judgments embodied in the Constitution: that the work of law-administration be under the supervision of a unitary, politically accountable chief executive; and that the structures chosen permit, even encourage, the continuation of rivalries and tensions among the three named heads of government, in order that no one body become irreversibly dominant and thus threaten to deprive the people themselves of their voice and control.

The first judgment leaves Congress free in particular cases to choose among a variety of relationships the President might have with those who actually do the work of law-administration, but it insists that some relation-

402. This directory power is related to, but not derivative from or coincidental with, his removal power. Thus, the propositions established respecting congressional control of presidential oversight are limited ones about the President's removal authority. There are some overlaps, of course, between the powers. A court might agree, for example, that a commission's refusal to perform a requested economic analysis of the impact of a proposed rule, to publish an agenda of its intended rulemaking activities for the coming period, to await the results of OMB review of agency comments on a rule, or to attend a meeting called to discuss them gave rise to "cause" for removal of one or more commissioners from office. The President also possesses in most cases the further authority to rotate the chairmanship among the sitting commissioners as a means of enforcing his displeasure with an incumbent regardless of cause. But he does not often use it. Neither does he often discharge secretaries of executive departments, whose response to his directives is invariably less than perfect, who often in their own political necessities must resist a course the President would have them take, and who are the ones empowered to sign any adopted rule. The secretaries, too, possess a measure of practical and legal independence. Thus, his removal power, like the directory power, does not vary whether the President is dealing with executive or independent agencies.

ship be recognized, sufficient to warrant characterization of the President's role as unitary, and sufficient to justify holding him accountable for the results of administration. From such reflections of the first judgment as appear in the constitutional text, one can understand a few necessary dimensions of that relationship: the appointment power, structure within which effective and confidential (absent special reasons) consultations may occur and, in the ordinary case, some degree of participation in the decisionmaking process.

The second judgment suggests constraints on the rationales Congress may employ for making law-administration remote from the Presidency. In some circumstances, most commonly those in which we think fairness to litigants requires careful observance of separation of functions within an agency, a congressional decision to insulate agency judgment from the Presidency will in fact connote a decision to exclude *all* politics, legislative as well as executive. This rationale seems generally persuasive. While even such exclusions might be questioned in some circumstances, the very process of observing parity of political treatment will restrain Congress from precipitous removal of agencies from presidential control. What the second judgment strongly suggests, however, is that such parity must be observed. Congressional removal of an agency from political relationships with the President while such relations were maintained with the Congress would signal conditions in which the intended competition and tensions among the constitutionally named heads of government would tend to be defeated. When the two judgments are taken together, it becomes clear that parity is only a minimum: the President has an independent claim to control the execution of government to balance Congress's independent claim to structure it.

With so large a subject and so rich a history, one cannot pretend to have done more than scratch the surface of possibilities. Nonetheless, the inquiry—and the reunderstanding it connotes—seems important. The formalistic view of the place of agencies creates assumptions and beliefs that would change if all agencies were viewed as essentially under the control of all three named bodies. For example, the *political* differences between the Federal Aviation Administration (in the Department of Transportation) and the Civil Aeronautics Board (an independent commission) seem to derive in part from the CAB's belief that Congress may consider the CAB entitled to be more independent of presidential direction than the FAA, which operates in a framework of expectation that it is bound by his directives. Even if the President believes he has directory authority over the CAB, exercising that authority nonetheless will require the playing of political chips in his dealings with Congress; the stakes in that game, which include the possibility of added congressional controls over the executive departments, may be too high to justify the play. Reunderstanding the issues in checks-and-balances terms—eliminating the illusion that agency structure depended on placement rather than relationship—could alter the expectations which underlie this political by-play.

Yet one ought not to expect, or even wish, these issues soon to be resolved. The expectation would be misplaced, because even bringing such

questions to court requires a combination of political will and circumstances—the dismissal from office, for example, of a commissioner who is then motivated to fight his dismissal through three layers of courts, and the existence of circumstances persuading the Court to grant certiorari—a combination more easily frustrated than attained. The wish would be misplaced because, as must already be evident, the imprecision of the relationship between President and Congress is at the heart of the mechanism by which the balance of the constitutional structure is maintained. It is not hard to say that the central issues are the unitary direction of law-administration, political responsibility for the whole within the constraints of law, and a tension between Congress and President in which neither is able to become dominant. Determining when the presidential capacities necessary to maintain that tension have been threatened will rarely be other than a difficult act of judgment.

Senator DECONCINI. Let me now go on to Mr. Brand.

STATEMENT OF STANLEY M. BRAND

MR. BRAND. Thank you, Mr. Chairman.

It is a pleasure to be here as one who with Gene Gressman litigated these cases. It is not every lawyer who loses in the Supreme Court who gets to come to the Congress and ask them to change it. That certainly is an honor.

I have prepared a statement which I will submit for the record and synopsize, if I can.

There is a great antipathy in our system to amending the Constitution because of the reverence that everyone holds for the Constitution and the difficulty in achieving ratification of a constitutional amendment. It has been used infrequently in our history to overturn specific Supreme Court decisions, although there are precedents for that.

In 1895, the Supreme Court struck down what was characterized as an income tax, which was held to be inconsistent with the article I restrictions on apportioning taxes consistent with enumerations of the census. The Congress responded to that in 1913 and the States ratified the 16th amendment.

In the interim, the Court stepped back from its initial decision in several ways. It circumvented its decision by taking refuge in great definitions of what a direct tax was, and also took other means to distinguish its earlier decision.

The suggestion has been put forward after *Chadha* that we ought to do the same thing. We ought to wait to see precisely what the application of the *Chadha* decision will mean.

My own view is that we have the final answer. The Court has left itself no elbow room within which to cut back on its initial decision. In fact, the subsequent summary affirmance of the other two cases from the District of Columbia Court of Appeals make it clear that it is going to apply that rationale across the board.

The lower courts, for their part, have, in my view, run amuck even further with the *Chadha* decision by applying it retroactively to decisions as far back as 1977. In a case in the District of Columbia, the court voided regulations issued by the GSA governing access to former Presidential papers. One judge in the Court of Claims, *sua sponte*, reached out and declared that the mere fact that a negotiated contract for the sale of land had to be submitted for informational purposes to a committee of the Congress rendered a *de facto* veto and voided the contract that had been entered into between the city and the Federal Government.

Another district court in Mississippi has thrown out the entire Reorganization Act under which the EEOC had reorganized itself, and with it all of the decisions they made under that plan, even though that reorganization plan had never been vetoed.

So my point is simply that we should not, nor can we, wait for the courts to further amplify and construe this decision because what we will get is more of the same and, in my view, a very chaotic system of the Federal Government where every decision rendered in the last 8 years will be subject to challenge by some disappointed litigant.

The Congress has several other ways of addressing the *Chadha* problem, and those have been debated at length, and I will not go into detail. It can control its delegation more strictly. That is a very difficult problem, as you can well imagine, to provide the kind of direct, clear guidance to an agency in sufficient detail to permit them to make no errors about what the congressional intent may have been.

There can be joint resolutions of disapproval or approval, which have been discussed. Those are obviously subject to presentment and would require a super-majority from the Congress if the President deemed to exercise his veto prerogative.

There are appropriations riders which have been used repeatedly in the past. To the extent that the House of Representatives has now changed its rules to make it more difficult for appropriations riders to be offered on the floor, that is a very cumbersome process as well, and I think that bottom line is that if Congress determines that the legislative veto is the means of choice, and it was the means of choice for many reasons, because it provides a very surgical way of controlling an agency which none of these other mechanisms quite provide that kind of ability to zero in just on the precise excess or misdirection that is engaged in by the agency, then it has the amendment option, and it ought to exercise it.

I think that I would also like to take issue just with one premise that Professor Strauss proposed, and that is that you would have no problem with the amendment but for the fact that it seems to give to Congress, but does not give concomitant power to the President, to participate in the process, and he gave the example of the independent agency.

The President gets his bite at the apple when he puts Commissioners on the FTC. If you look at article II and you look at article I, you will see that the President is really a bit player compared to the Congress. In fact, it has been said by Raul Berger and others that the framers had to fill up article II with things for the President to do because his array of powers looked so paltry next to the

Congress, and so they put in a provision that said he could ask for opinions from his advisers, as if that was a matter of constitutional import.

Senator DECONCINI. Excuse me, Mr. Brand. Would you also not agree that the President has a great deal of budgetary influence even on independent agencies, since his budgets come up here, even though we do not have to adopt them.

Mr. BRAND. That is right.

Senator DECONCINI. He can take a big slice out of those agencies if he does not agree with Congress' creation of them or with the direction that Congress thinks they should go.

Mr. BRAND. And I think, Senator, much to your dismay at times, we have also given him the OMB.

Senator DECONCINI. That is exactly what I mean, through OMB.

Mr. BRAND. So that we have given him quite a good deal of authority, again, the point being that I think whatever balance is re-directed or restructured by way of your amendment is not inconsistent with the balance that is struck in the original document.

The constitution gives the President limited ways of checking Congress, and those very few specific ways of limiting Congress would not be affected by your amendment. He would continue to have veto authority over legislation. He would continue to have the appointment authority, and he would continue to have all of that power delegated to him by statute.

I do not view that as a destruction of the original scheme.

Thank you.

[The following was received for the record:]

PREPARED STATEMENT OF STANLEY M. BRAND

Mr. Chairman, I appreciate the opportunity to come before your committee and discuss again a subject on which I have appeared on numerous occasions -- the so-called legislative veto and the Supreme Court's decision declaring the veto unconstitutional.^{1/}

Although I have left my position as General Counsel to the Clerk of the House, in which capacity I litigated the legislative veto cases, to pursue the practice of law in Washington, I retain an intense and abiding interest in the subject, which I view as one of the most absorbing issues of governmental decision making and power sharing to concern the Congress for quite some time. The discussion for today -- a proposal to amend the Constitution to establish the legislative veto -- bespeaks the likelihood that the issue will be with us for some time to come.^{2/}

At this juncture and for purposes of our discussion, we need not dwell on the decision itself or its precise holding, with which we are now very familiar,^{3/} except insofar as the decision casts light on the perceived need for an amendment.

^{1/} INS v. Chadha, 103 S.Ct. 2764 (1983).

^{2/} Even after an amendment is formally proposed to the states by Congress, ratification typically entails several years, and sometimes more. State of Idaho v. Freeman, 529 F.Supp. 1107 (D.Idaho 1981) vacated as moot, 103 S.Ct. 22 (1982).

^{3/} In essence, the court declared that all action taken by Congress having the purpose or effect of legislation, defined as having "the purpose or effect of altering the legal rights, duties and relations of persons ... outside the legislative branch" INS v. Chadha, 103 S.Ct. at 2784, requires bicameral approval and presentment to the President. Id.

It is now axiomatic that constitutional amendments are reserved for what have come to be viewed as fundamental and basic flaws in our system of government requiring corrective and remedial action,^{4/} or the protection or guarantee of rights deemed innate in a democratic society, though not expressly addressed by the Constitution itself.^{5/} Despite the fact that we have amended the Constitution some 26 times, and have even repealed an amendment which was viewed as an ignominious failure,^{6/} there seems to be a deep seated antipathy to amending the Constitution for anything less than the most compelling and far reaching reasons, perhaps partially out of understandable reverence for a document so carefully crafted which has served so well as "the basic charter" of our government and which has adapted to changing times and technologies.^{7/} As one Supreme Court Justice explained:

For in setting up an enduring framework of government [the framers] undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were

4/ E.g., U.S. Const., Amend. XXV (Presidential succession and disability).

5/ E.g., *id.*, Amend. XIV (due process and equal protection).

6/ U.S. Const., Amend. XXI (repealing prohibition).

7/ Valley Forge Christian College v. Americans United For Separation of Church and State, 454 U.S. 464, 476 (1982).

intended to be achieved by the Constitution as a continuing instrument of government.^{8/}

Despite this natural reluctance to trifle with our charter for any but truly indispensable elements of democracy or individual rights, it is not unprecedented for Congress to overturn Supreme Court constitutional interpretations when deemed necessary to the public interest. The Congress added the Sixteenth Amendment after the court held a tax imposed by Congress uniformly throughout the United States^{9/} was unconstitutional^{10/} because not apportioned according to the census as required.^{11/} And it added the Fourteenth Amendment to set aside the famous Dred Scott decision holding blacks were not eligible for citizenship.^{12/}

The Chadha decision, no less sweeping in its terms or dramatic in its effect, has dealt as serious a blow to government equilibrium as any decision of the last several decades. As

^{8/} United States v. Classic, 313 U.S. 299, 316 (1941)(citations omitted).

^{9/} Income Tax Act of 1894, 28 Stat. 509, 553 (1894).

^{10/} Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895).

^{11/} U.S. Const., art. I, §9, cl.4. ("No Capitation, or other direct Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.")

^{12/} Scott v. Sanford, 19 How. (60) U.S. 393 (1857) See United States v. Wong Kim Ark, 169 U.S. 649, 688 (1898)(Congress set aside the Dred Scott decision in the first sentence of §1 of the Fourteenth Amendment "declaratory of existing rights, and affirmative of existing law...").

Justice White observed, the Court felled more statutes "in one fell swoop" by the Chadha decision "than the Court has cumulatively invalidated in its history."^{13/} As another Justice remarked, "the breadth of this holding gives one pause."^{14/}

Some have urged caution in proceeding too swiftly in the post-Chadha era lest the congressional response prematurely sever further judicial amplification of the decision.

For example, "[d]uring the interim between the Pollock decision in 1895 and the ratification of the Sixteenth Amendment in 1913, the Court gave evidence of greater awareness of the dangerous consequences to national solvency which that holding threatened and partially circumvented it, either by taking refuge in redefinitions of direct tax or, more especially, by emphasizing, virtually to the exclusion of the former, the history of excise taxation."^{15/}

This Court evidenced no such "awareness" and when it summarily affirmed two other veto cases presenting different questions than those presented in Chadha,^{16/} it appeared to deny

^{13/} INS v. Chadha, 103 S.Ct. at 2810-11 (White, J., dissenting).

^{14/} Id., 103 S.Ct. at 2788 (Powell, J., concurring).

^{15/} Jayson, The Constitution of the United States of America: Analysis and Interpretation, S.Doc.No. 82, 92d Cong., 2d Sess. 1554 (1973).

^{16/} Process Gas Consumers Group v. Consumers Energy Council of America, 103 S.Ct. 3556 (1983)(one house veto of proposed Phase II natural gas pricing regulations); Consumers Union of the United States v. FTC, 103 S.Ct. 3556 (1983)(two house veto of proposed used car rule).

itself any constitutional elbow room within which to redefine or circumvent Chadha's proscriptions. There is little reason to believe that the Court, unaided by statutory revisions in the procedures by which Congress reserves power over agencies or constitutional amendment would or could move in any way to limit its construction.

To be sure, there are other ways in which to recapture the loss of control stricken with the legislative veto, and many of these have been discussed.^{17/} None of the alternatives relieve the Congress of the burden of acting bicamerally and presenting its action to the President. For example, former Senator Javits' suggestion that the Congress replace the concurrent resolution provision of the War Powers Resolution with a joint resolution^{18/} as one way of dealing with Chadha would require a super-majority to sustain any congressional disapproval.^{19/}

If Congress remains convinced after study of the legislative alternatives to the legislative veto that the prelapsarian pristine veto is indispensable, then clearly constitutional amendment is an option. In my own mind, it is a justifiable option given the breadth and sweep of the decision, which has

17/ The U.S. Supreme Court Decision Concerning The Legislative Veto: Hearings Before the House Committee on Foreign Affairs, 98th Cong., 1st Sess. (1983); Stanley M. Brand, "Congress Has Post Chadha Legislative Veto Options," The Legal Times of Washington, Dec.5, 1983, at 12, col.1.

18/ 50 U.S.C. §§1544(c).

19/ Javits, "Who Decides on War," N.Y. Times Magazine, Oct. 23, 1983, 56, at 107.

fostered constitutional chaos, from throwing into doubt and uncertainty criminal convictions obtained in the District of Columbia^{20/} under the Home Rule charter^{21/} to nullification of reorganization plans implemented by government agencies under statutes conferring legislative vetoes which were never exercised,^{22/} to striking regulations promulgated over seven (7) years ago by the General Services Administration governing access to the White House papers of former President Nixon's staff^{23/} to invalidation of a contract for the sale of federal property to a municipality because the General Services Administration was required to submit the terms of negotiated sales to the Committee on Government Operations.^{24/}

Two constitutional maxims are called to mind when the Supreme Court fulfills its function as "ultimate interpreter of the Constitution."^{25/} First, "[i]t is emphatically the province and duty of the judicial department to say what the law is ..."^{26/};

^{20/} The Washington Post, Feb. 9, 1984, at C2, col.2.

^{21/} Pub.L.No. 93-198, 87 Stat. 774, D.C.Code Ann. §§1-233(c), 1-207 (1973).

^{22/} Allstate Insurance Co. v. EEOC, 570 F.Supp. 1224 (S.D.Miss. 1983).

^{23/} Richard A. Allen, et al. v. Gerald P. Carmen, et al., Civ. Action No. 83-3099 (D.D.C. issued Dec. 30, 1983).

^{24/} City of Alexandria v. United States, No. 560-82L (Ct.Cl., issued Oct.20, 1983) appeal docketed No. 84-713 (Fed.Cir.).

^{25/} Powell v. McCormack, 395 U.S. 486, 548-49 (1969).

^{26/} Marbury v. Madison, 1 Cranch (5 U.S.) 137, 178 (1803).

and, second, judicial duty includes "interstitially ...filling in with judicial interpretation the vague, indefinite, or generic statutory or common law terms"^{27/} or constitutional provisions.

Neither of these maxims stand in the way of a third revelation: constitutional adjudication of government powers and rights is not necessarily the end of the constitutional process, for it may be continued by virtue of the Article V procedure for amendment. I see no reason to exclude from consideration an express option included by the Framers used over thirty (30) times by Congress to make needed adjustments or changes.

^{27/} Linkletter v. Walker, 381 U.S. 618, 624 (1965).

Senator DeCONCINI. Thank you very much.
Mr. Kennedy.

STATEMENT OF CORNELIUS B. KENNEDY

Mr. KENNEDY. Thank you very much, Senator DeConcini.

It is, of course, an honor and a pleasure to be here this morning to discuss this issue of the constitutional amendment which you have proposed. Since it is a constitutional amendment, we do not have to get into whether or not it would be constitutional. So I will try to address initially, since you already have my prepared statement, the question of the difference between this approach and the approach of Senator Grassley's legislative veto legislation.

I will except from my comment the fact, as Professor Strauss has urged, that perhaps the President is shortchanged under the constitutional amendment. Perhaps he should have more control over the executive branch, including independent agencies or perhaps as Mr. Brand has said, he already has enough control I think we can set that issue aside.

The real difference between the two approaches of doing it by legislation or by constitutional amendment, as I view it, is that the constitutional amendment is necessary if the executive authority to act is to remain constant. Under Senator Grassley's amendment, the executive action comes to Congress as a recommendation, and only if that recommendation is approved, in the manner that bill provides, by a joint resolution signed by the President, could it become authorized executive action. That is it is just as though the executive agency or the President was recommending anything to Congress. It takes legislation.

The constitutional amendment route says that you do not need that step of legislation. It would authorize merely congressional action of approval by Congress alone. That is a very significant difference, and if the constitutional amendment is viable, I think it would be a cleaner way to go at it because it does not mean that you have to sunset the executive branch authority every time Congress wants to review something.

That is, I think, the basic, fundamental difference.

Let me turn then to some comments on the constitutional amendment as it is proposed. As I have indicated in my prepared statement, I think it is quite consistent with existing constitutional procedures. Perhaps the best example is the appointment power.

Congress creates by legislation presented to the President a government office, and it authorizes the President to appoint to that office, that is, to nominate to that office. But it retains control, if it wishes, over the right to disapprove that nomination. It is almost exactly a parallel to what the constitutional amendment proposed by Senate Joint Resolution 135 would extend to other activities of the Government.

Now, is it consistent with the underlying scheme of the Constitution on separation of functions? I believe it clearly is because the Constitution was set up, as Mr. Strauss, I believe, said, to make the functions of the executive and the judicial branches almost entirely hinge on the action of the legislative branch in adopting statutes or approving treaties.

The President's only powers in the Constitution that I have been able to find that do not relate to legislative action are his power as Commander in Chief, his power to grant pardons and reprieves, and his power to receive ambassadors. Apart from that, every other power in article II hinges in some way on congressional action.

So the Constitution recognizes that national policy is the function and the responsibility of the Congress. If that is true, it seems to me that the proposed amendment is quite consistent with our national policy as it is set out in the Constitution.

We must remember, too, and I think it is quite important, that this national policy was not a flash of genius in 1787. The development of the ideas that we had in this country of self-government took place over a period of 175 years, during which the colonies had almost total freedom of domestic self-government. It was not until the mid-1770's that the English Parliament and King attempted to intervene in domestic matters. Up to that time the English Government had been concerned almost completely with the foreign affairs and foreign trade of the colonies.

If you want to trace this, development of the separation of functions in the colonial charters, it began in Massachusetts and in Virginia with the legislative body, the elected body, elected by the colonists themselves, having all three functions of government. As early as 1641 in Massachusetts, they began to sever off the functions because they had already been concerned in Massachusetts and in Virginia about the fact that as it was later described by Hamilton in *The Federalist*, if the same hands control all three powers at once, then they can mischievously pass a law, execute it and adjudicate a violation of it.

It was the same year, incidentally, 1641, that the English Parliament repealed the authority of the Court of the Star Chamber, which had exactly that same combination of functions and became so infamous for the way it abused them.

So the proposed amendment in no way is in contradiction of the principles of the separation of functions. What it does say very clearly is that the representatives elected by the people shall make the national policy. One can throw in a modification of that by saying except as that national policy has been made by the people themselves in the Constitution. The other two branches of Government must follow that policy I see nothing inconsistent with that concept if a constitutional amendment says that executive action taken under statutory authority must be submitted to the Congress for approval if the Congress wishes.

Now, I doubt very much that that congressional power is going to be greatly abused. As you have already said, Senator DeConcini, as a practical matter, the legislative branch grants great discretionary authority to the executive branch in almost every area. But there is nothing that says the Congress should not and, indeed, does not have a duty to look at things and to say "no" to executive action.

It is not executive inaction which is the subject here. It is executive action because it is the action that impinges on the public, and it is the duty of Congress to oversee and to control that executive action.

So the difference that my friend, Judge Scalia, always argued, between interference with the executive function and the approach

which I think the separation of functions principle mandates, is, I believe, the one taken by this proposed amendment. Under this amendment the legislative branch would not be impinging on the executive duty. It is not executing the statute. It is merely defining in connection with executive action what the national policy is.

I would be glad to answer questions. I do not think that I will get into the arguments that Professor Strauss raised about whether or not the amendment covers the President's right to control his branch as well as he ought to be able to under the statute.

Senator DECONCINI. Thank you.

[The following was received for the record:]

PREPARED STATEMENT OF CORNELIUS B. KENNEDY, Esq.*

Mr. Chairman and members of the Subcommittee:

It is an honor and a pleasure to appear before you today to testify with respect to S. J. Res. 135, the proposed constitutional amendment dealing with congressional review of executive action, which the Chairman and other members of the Senate have proposed.

As the Subcommittee is aware, I have previously testified on this general subject before both Senate and House Committees. I have served as a member of the Council and then as Chairman of the American Bar Association section on Administrative Law, and I am presently Chairman of its Committee on Rulemaking. I served five terms as a public member of the Administrative Conference of the United States, and was Chairman of its Committee on Rulemaking during most of that period. I am now a Senior Fellow of the Conference. I am also a member of the American Law Institute and a Fellow of the American Bar Foundation. The testimony which I will give today, however, consists of my own views and I do not appear today as a representative of any of those organizations.

I should also note that I represented the interests of the Senate in the early legislative veto cases prior to the creation of the in-house Office of Senate Legal Counsel. In addition, I have written articles for various legal publications on constitutional issues, particularly the apportionment and exercise of governmental powers by the three branches of government as provided for in the Constitution.

* Mr. Kennedy is in private practice in Washington, D.C. as counsel to the law firm, Armstrong, Teasdale, Kramer & Vaughan, St. Louis, MO.

I commend the Committee for its careful attention to this most important subject to which the proposed amendment is directed. It is both important to the day to day execution of national policy and timely as we approach the 200th anniversary of our Constitution. It is also critical because of the sweeping statements made in the Chadha opinion by The Chief Justice with respect to the constitutionality of the legislative veto provisions incorporated in statutes.

It should be noted at the outset that because the proposal which the subcommittee is considering is in the form of a proposed constitutional amendment, it is unnecessary to discuss whether the proposal would be, or would not be, constitutional. It is more relevant and more useful, instead, to discuss how such an amendment would fit into the general scheme of the Constitution and, especially, whether it is consistent with, or represents a departure from, the procedures established in the Constitution. My comments, therefore will deal primarily with the principle of separation of functions, both as part of the constitutional scheme and as it is applied to the various procedures in the Constitution.

The proposed amendment provides that executive action may be made subject to the approval of one or both Houses of Congress, without presentment to the President, if the legislation authorizing the action so provides. As a starting point it should be noted that the concept of one or both Houses of Congress being able to block executive action authorized by statute without taking legislative action which is presented to the President is fully consistent with existing constitutional procedures. For example, when the Congress creates federal offices but does not vest the appointment to such offices "in the President, the courts of law or the heads of departments," the Constitution

provides that the action of the President in appointing persons to such offices may be blocked by just one House, the Senate, even when the President has been authorized to make the appointments by legislation adopted by both Houses and presented to the President. This proposed amendment would merely explicitly extend the application of that principle to other situations to which the Congress and the President agreed, by legislation adopted by Congress and presented to the President, that it should be extended.

Under existing constitutional procedures furthermore, one house of Congress, by denying its assent to an appropriations bill, can deny the executive branch the funds necessary to carry out actions it has been authorized to take by both Houses of Congress and the President. Thus, the concept of the proposed amendment is consistent with existing constitutional procedures. To those who argue that congressional action to say No to previously authorized executive action is valid only if it is in the form of legislation adopted by both Houses and presented to the President, the appropriations procedure is an example of a congressional veto of executive action which does not require legislation and presentment to the President.

Certainly, also, the Constitution presently permits Congress to exercise control over proposed executive action by ingenious use of sunset provisions or by a requirement that proposed executive action receive authorization by legislation before it can be taken. Under both these approaches even one House could prevent the proposed action from taking place by refusing to grant the authority to actually take the action. While perhaps cumbersome, such statutory schemes could permit effective congressional oversight over executive

action before it could take place. I do not urge such approaches, however.

Instead, I will turn to an analysis of why the proposed amendment is fully consistent with the concept of separation of functions which is the organizing scheme of our Constitution. The record on this point is so clear that those who would oppose the amendment would have to do so on the quite different ground that the amendment could result in an increase in the workload of Congress. I believe that Congress' workload is a matter for Congress to decide, not for commentators and others outside the Congress to decide for Congress. I feel the same about the argument that the proposed amendment would restrict expeditious action by the executive branch. It is for Congress to decide what restraints should be placed on executive action and how much discretion the executive branch should have in executing statutes adopted by Congress.

It would appear that since the philosophy of the amendment is consistent with existing constitutional procedures, it should not violate the principle of separation of functions in the Constitution. To test that statement it is necessary to examine the purpose of the principle of separation of functions as it appears in the Constitution. With respect to the separation of legislative and executive functions, Hamilton, in the Federalist, quoted Montesquieu as writing "When the legislative and executive powers are united in the same person or body, there can be no liberty, because apprehension may arise lest the same monarch or Senate should enact tyrannical laws to execute them in a tyrannical manner." He also quoted Jefferson as writing, in his Notes on the constitution adopted by Virginia, that "for this reason, the Convention which passed the ordinance of government

laid its foundation on this basis, that the legislative, executive, and judiciary departments should be separate and distinct, so that no person could exercise the powers of more than one of them at the same time."

Thus, simply stated, the purpose of the principle of separation of functions between the executive and legislative branches is that the legislative branch should not be able to execute the law it adopts. Our founding fathers did not want the Congress to be able to execute the laws it passed because they feared such a government would rapidly degenerate into the fearful excesses under which laws were made and administered by the same hands.

The reason for this decision of the Constitutional Convention can be found in the long history of the development of our concept of self government during a period of 175 years prior to the Convention. It often goes unnoticed, or untaught, that the interference of the English Parliament and Crown in the internal affairs of the colonies was not great until the mid 1700's. Prior to that time, the English government restricted itself principally to the foreign affairs and foreign trade of the colonies. As a result, from almost the beginning of our colonial history, the colonies had enjoyed an unprecedented degree of self government in domestic matters and the opportunity to develop and refine their ideas on the essentials of a structure for self government.

The early government of the Massachusetts and Virginia colonies, for example, was in the form of an elected assembly which not only made the laws and assisted in executing them but also adjudicated violations of the laws. This combination of the three functions of government in the same hands soon provoked cries of tyranny and, in 1641, the Massachusetts

Bay Colony Body of Liberties was revised to provide the initial elements of the separation of governmental functions. Under it, those exercising the judicial function were forbidden to punish a violation of the law unless the law had been duly made by the people's elected representatives and sufficiently published. This was the same year, incidentally, that Parliament abolished the infamous Court of Star Chamber in which the three functions of government were exercised by the same hands.

By the time of the Constitutional Convention in 1787, the concept of separation of functions was generally the scheme of the colonial governments. Thus, during the debates in the Convention as well as in the Federalist, the colonial experiences were frequently referred to as the delegates repeatedly rejected proposals to give the judiciary and the executive a function in the making of the laws as members of what was called a Council of Revision.

The pervasiveness of the concept was also evident when the delegates were considering the description of the executive function. Mr. Madison moved to insert after the words "with power to carry into execution the national laws," the words "and to execute such powers, not legislative or judiciary in their nature, as may from time to time be delegated by the national legislature." Mr. Pinkney pointed out that the proposed language was unnecessary because it was already included in the power to carry into effect the national laws, and that portion of Mr. Madison's amendment was defeated. There was no doubt in the delegates' mind that by definition the executive function included no power to exercise the legislative or judicial function.

This was particularly true in a situation in which there could be a difference of opinion between the executive and the legislative branch with respect to the executive action to be taken under a statute. To permit the executive opinion to prevail would be to allow the executive to exercise the legislative function. Thus, when the executive and the legislative branch disagreed, the principle of separation of functions demanded that the legislative branch have the right of final decision as to the executive action to be taken.

The presidential veto over bills passed by Congress is an example of such adherence to the separation of functions principle by the Convention. Proposals that the President should have an absolute veto power over legislation, were intensely debated and rejected by the delegates because it would have given him participation in the legislative function. Also rejected were proposals to give the judiciary a role in the rejection of legislation before it should become effective. Ultimately, the President was given only a "qualified negative," as Hamilton termed it, and the judiciary was empowered only to reject laws which were incompatible with the Constitution. Colonel Mason put it bluntly when he argued that under this result while judges could declare an unconstitutional law void, with regard to every law however unjust, oppressive or pernicious which was not unconstitutional, "they would be under the necessity as judges to give it a free course." The delegates realized that exercising even these limited roles with respect to legislation passed by Congress, the executive and judicial branches needed protection from legislative branch retaliation and inserted explicit constitutional provisions that their salaries could not be reduced during their term of office.

The 1803 opinion by Chief Justice Marshall in Marbury v. Madison, 1 Cranch 137, (1803), is most often cited for the principle that the courts can declare a statute passed by Congress void if it is at variance with the Constitution. However, the issue in that case was whether the granting of the commission to Marbury was a ministerial act which could be mandamused by the court, or whether it was a discretionary act as to which the court could not substitute its decision for the discretionary decision vested in the executive. The opinion recognized, so short a time after the Constitutional Convention, that it was clearly within the concept of separation of functions for Congress to put such limits on executive action it authorized as it thought necessary and proper. These limits which Congress can, indeed must set, are constitutionally necessary to prevent the executive from exercising, in fact, the legislative function.

Thus, there can be no more direct way of implementing the separation of functions principle than a provision such as the proposed amendment which would permit Congress to require executive action to be submitted to it for approval. It is the responsibility, as well as the right, of Congress to be responsible to the people for the action which the executive may take. This is the essence of the Constitution. It was described by the Chairman of the Subcommittee, when he introduced the proposed amendment, as the crux of the issue: "Who shall be responsible for the laws of the land?" Clearly, the Congress is, and must be, responsible.

A solid foundation exists, therefore, for the proposed constitutional amendment which would remove any impediments created by the Chadha decision to the exercise of this

congressional duty. While it could be argued that Congress presently has the power to carry out that duty, the proposed constitutional amendment, if adopted, would clarify the situation, given the confusion generated by the broad language of the Supreme Court's decision in the Chadha case.

The proposed amendment certainly is not at variance with the concepts and procedures established in the Constitution. Nor is the proposed amendment in any way contrary to the principle of separation of functions in the Constitution. Rather, it would permit the Congress, because of the restraints imposed by the Chadha decision, to better carry out its function.

I thank the Chairman and the members of the Subcommittee for the opportunity to present these views. I, of course, will be willing to answer any questions by the Subcommittee to the best of my ability and to work with the Subcommittee and its staff in this endeavor.

Mr. KENNEDY. I do very much disagree though, I might say, finally, with the thought of Professor Elliott that we should add language like "executive and administrative lawmaking."

Senator DECONCINI. That is the question I wanted to ask, if you would address why that would help.

Mr. KENNEDY. Well, first of all, administrative action, I believe as Professor Strauss said, is a part of the executive branch action anyway, and I think such a change merely adds an additional problem of interpretation.

Second, I do not think that the executive branch, under the separation of functions doctrine, engages in lawmaking.

They may use a quasi-legislative procedure in coming up with a rule, just like they may use a quasi-judicial procedure in adjudicating a claim, or a reparations award. But that does not make the action judicial or legislative.

Senator DECONCINI. Mr. Kennedy, do you think that some of the rules that are promulgated by executive agencies are laws?

Mr. KENNEDY. They are executive action to implement a statute. They cannot exceed the statutory authority granted, and they are nothing more under our Constitution than executive branch action. They cannot be legislative. Congress cannot delegate the legislative power.

Senator DECONCINI. The rules do not have the full force and effect of law then.

Mr. KENNEDY. They do not have the full force and effect of the law—perhaps let me put it this way—because the court cannot review the wisdom of the law or what motivated the law. The court can review what motivates an administrative regulation.

They are totally different. They may have a harsh effect on the public, a very strict and binding effect on the public, but they are not lawmaking.

Senator DECONCINI. Thank you, Mr. Kennedy.

Let me go back, Mr. Strauss, to one distinction. You make a fine case of the administrative separation or the executive separation here. But it seems to me this proposed amendment permits that executive protection.

Hypothetically, if this were in the Constitution now, and the Congress passed two pieces of legislation, and attached a legislative veto to one and not the other and they pass simultaneously, when they are sent to the President, he still has that authority to veto the one that has the legislative veto attached if he so elects because he does not think it is proper for this particular agency or he does not like it in principle or philosophy.

Doesn't that still provide that ultimate separation and authority that the executive has under the Constitution?

Professor STRAUSS. No, I do not think so, Senator. I know that that is an argument which has been persuasive to many. To me the one-bite-at-the-apple proposition fails to consider the sweep of history. A Republican President, let us say, may sign a bill in 1984 for political reasons, which may include his wish to get some other very important piece of business that is attached to that legislation done. That presents the Democratic President in office in 2020 with a severe problem of inability to control what is going on, of incapacity to see to the faithful execution of all of the laws, which is his responsibility.

Senator DECONCINI. Doesn't that happen today even outside of the legislative veto area with compromise legislation—passing something or accepting something you do not like—

Professor STRAUSS. Well, of course, it does.

Senator DECONCINI [continuing]. And then 20 years down the road, another President having to address that?

Professor STRAUSS. Well, of course it does, except that what that tends not to do—

Senator DECONCINI. Maybe you are saying we should not do it another time.

Professor STRAUSS. No, no. But what enactment of simple legislation tends not to do is to alter the fundamental balance between this individual, the President, and the Congress.

If I can for a moment, I hope this will be an illustration, respond to what I think is a very persuasive argument that my friend Neil Kennedy made. He said, well, this is really just like the appointment power.

What I would like to point out to you is that the appointment power, cannot be given to an independent regulatory commission, cannot be given to the Secretary of Defense, in a way that makes it subject to confirmation by the Congress. Only when it is the Presi-

dent himself that makes the appointment may the Congress retain the right of saying, "No, no, you do not."

And I will say again, I see no objection, other than a possible political objection, to a constitutional amendment that says any rule that the President proposes, the Congress may legislatively veto. That would not, in my view, change the balance.

But the fact of the matter is that when Congress creates these agencies, it creates them at a distance from the President. It does not permit him to exercise the kind of political control over the outcome of their behavior that this amendment would vest in the Congress, and it is just for that reason that it is objectionable.

Senator DeCONCINI. That is interesting.

Professor STRAUSS. And if I can go back to his historical analysis, which again seems to me very apt, but it ended perhaps a bit too soon. The choice that was made in 1787 was a choice made in contemplation of the experience of the States and the Confederation, as he points out. The choice before the drafters was a choice between the experience of the State of New York, where a strong Governor with an independent position had been able to serve as an effective check on the Legislature of New York, and the situations that had existed in the other States where the legislature retained control over the definition of the executive and could set up multiheaded executives, councils of revision, and the like. And if there is anything that is clear about the Constitutional Convention, it is that the convention resisted and defeated the idea that the legislature should be in a position to define the executive in that way or to handcuff the executive in that way.

There was to be a unitary executive. He was to have a relationship with all of that part of Government that carried out the laws, and all I implore you to do is to maintain that.

Senator DeCONCINI. Thank you.

Mr. KENNEDY. I think that Professor Strauss has again tended to focus the discussion, but let me add that the power of appointment under the Constitution, of course, can be vested by legislation, presented to the President, in the courts of law or the President himself or the heads of departments. In other words, a part of Professor Strauss' problem is that Congress and the President have agreed in legislation that the Secretary of Commerce will make some appointments or that somebody else will make them.

If the President would veto such legislation and make Congress pass it over his veto by two-thirds, for example, to assert a right to appoint all officers of the Government, as the President could under the Constitution in the absence of such a provision, then Professor Strauss' point would be correct. But that is something which can be handled as we go along. That does not go to the point that this proposed constitutional amendment goes to.

Professor STRAUSS. No, Mr. Kennedy makes my point very nicely. When you give the appointment power to the head of a department, who by the way must be appointed through the President and Senate acting in conjunction, when you give the power to the head of a department and consequently take that appointment power out of the political control of the President, in the very same act you take it out of your own political control. You cannot reserve the right to approve an appointment that the President does

not have the right to approve. It ought to be the same way with rules.

Mr. KENNEDY. Perhaps we should have a second constitutional amendment to go to Professor Strauss' point.

Senator DECONCINI. The realistic problem is, if a constitutional amendment is the proper solution, how do we generate the enthusiasm to move it forward? It is much easier with a moral issue or a war powers issue to create interest. That is the practical problem we face here.

But I want to thank you. Do you have anything further, Mr. Brand?

Mr. BRAND. No, sir.

Senator DECONCINI. I appreciate your testimony. It was very helpful.

Next we will have the third and final panel: Loren Smith, Chairman of the Administrative Conference of the United States; Prof. Eugene Gressman, University of North Carolina Law School; and Hon. Antonin Scalia, circuit judge of the U.S. Court of Appeals.

We will begin with Mr. Smith. Gentlemen, all of your statements will be inserted in the record. Please go ahead with your testimony.

STATEMENTS OF A PANEL CONSISTING OF LOREN A. SMITH, CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES; PROF. EUGENE GRESSMAN, UNIVERSITY OF NORTH CAROLINA LAW SCHOOL; AND HON. ANTONIN SCALIA, U.S. COURT OF APPEALS

Mr. SMITH. Thank you very much.

Let me make four general comments before speaking specifically about the amendment that is under consideration.

First, it seems to me critical, when considering this particular issue, to realize that we are dealing in large part with a symptom of a larger concern that affects people in this country. This concern, which affected the election in 1980 and the last several elections, is that Government is too large, too out of control, and that it impinges on people's lives in too many ways. I think in considering the constitutional and legislative issues that relate to legislative veto, we should remember that the legislative veto is only one symptom of this underlying malaise or problem.

Another symptom of the larger concern is the almost obsessive focus on regulatory reform over the last several years. Another symptom is the Congress' dealing with the Bumpers amendment on a number of occasions. And yet another symptom is OMB's regulatory reform efforts, which now exists as a very extensive and elaborate system of review under President Reagan, but began under President Ford and President Carter.

In summary, I think the legislative veto is a symptom of a very real problem, and that is that Government impinges too much on the freedom of the individual, and Government impinges too much on the functioning of the economy. So my first point is that we are not dealing with an abstract legal or constitutional question.

The second thing I want to say is that I especially appreciate appearing before this subcommittee and Senator DeConcini. Senator, your work on the Equal Access to Justice Act—an area where the

conference has worked closely with you—is another attempt, I think, to get at the basic problem in this country, which is that our system is not as responsive to the needs of freedom and to the needs of the economy as it should be.

But in addressing the particular problem of legislative veto, I think we should seek practical solutions that will really achieve the results we want, and I am concerned that the constitutional amendment approach may not achieve that goal.

A third general observation that I make is one, I guess, that stems from my practicing law and also teaching constitutional law. That observation is that what is fair is usually what is rational, and what is both fair and rational usually works. In attempting to develop any system rather than start from constitutional theory, we should start by trying to structure a system that is reasonable, rational, and that makes some kind of sense.

In looking at the legislative veto, we too often, I think, ignore the functional aspects of legislative veto: how it is actually going to work; what really is going to happen in the Congress, in the executive branch, in the agencies if legislative veto provision is adopted.

The Conference, of course, does not have the role of constitutional advisor to the Government. Our role is being an advisor both to the President and the executive branch and to the Congress on the Government's procedural system. Nevertheless I feel somewhat obliged to say something about the constitutional issues, not because of my present role as Chairman of the Conference, but because of my past life as a professor of constitutional law.

Speaking as the Chairman of the Conference, we have a recommendation that was adopted in 1977, which called upon the Congress not to adopt any generalized legislative veto system and also not to employ the legislative veto as a regular procedure of Government.

One reason the Conference took that position was that it felt the legislative veto presented a potential trap for the Congress. I think the members of the Conference believe—and I certainly hold this view very strongly—that the major and legitimate role of the Congress in our system is to ensure that legislation is generally proper and rational; to make the great policy decisions, and also that Congress has a most critical and important oversight role.

Most of the fellow agency heads with whom I deal very strongly want Congress to make the major policy decisions. They know they are not politically elected officials. They know that you in the legislative branch of Government have the expertise when it comes to knowing what the people want and what kinds of policy decisions need to be made.

But these agency heads are also aware of the enormous body of regulatory material that is turned out every year, ranging into the tens of thousands of pages in the Federal Register. They also know that Congress is a very busy institution, and that one of the dangers in any system is that unless you get rid of the little things, you cannot concentrate on the big things.

The concern that regulatory agency heads have relates to their ability to carry out the mandate they have from Congress to execute a particular program, to serve the interests created by the mandate that has been given to them by the Congress. That proc-

ess of implementing status is a very complex one. Even in the most efficient litigation, cases may take years to go through the courts. Major pieces of legislation, someone estimated, take about 10 years from their inception to the time they are finally implemented.

Given that particularly viscous system, the legislative veto tends to be rather impractical in most cases. In fact, if one looks back at the agenda of the Congress in recent years, the number of times legislative vetoes actually have been exercised is relatively small.

Therefore, the practicality or efficiency of the veto was one concern that the Conference had when it recommended against any generalized system of legislative veto.

A second concern that the Conference had relates to due process of fairness. Federal rulemaking under the Administrative Procedure Act is a strange animal. We have created a kind of judicialized legislative process by which the agency makes rules, and it is not like the process by which Congress makes laws. The Congress is responsive to the will of the people, and there is no set form or procedure. If the Members think something is good, we trust their expertise, and it becomes law.

The Federal agency rulemaking process is more judicialized because the Federal agencies are not responsive to the people in the same sense. They are not elected by the people. We have established, through the Administrative Procedure Act, a series of procedures that give everyone an equal chance to comment on a rule. There is a requirement of fair notice and provision that the agencies must articulate reasonable grounds for adopting a rule. Then there is judicial review, which insures that if these hops and steps have not been complied with by the agency, the rule can be overturned for procedural reasons.

Legislative veto tends to shortcircuit that particular process. One of the interesting lines of research that has been going on involves looking at what really happened when a rule is vetoed or when a legislative veto provision applied to a regulatory program.

There is a process of negotiation that occurs. The regulator is looking over his shoulder to see what the Congress is going to do in a particular area. And the interest groups, often, rather than presenting their opinions forthrightly to the agency and going through the open, public process of rulemaking, feel they have the real bite at the apple before the congressional committee that is considering the legislative veto resolution. Lobbying replaces the open, judicialized, rulemaking procedure.

Now, I am not saying that is necessarily bad, but it certainly goes against the direction of regulatory reform—beginning with the Administrative Procedure Act—which tries to regularize the rulemaking process. It tends to add an element, perhaps not of irrationality, but at least one that tends to undermine the scheme set up by the APA.

Congress passage of the Administrative Procedure Act was a great act of regulatory reform; it sought to regularize administrative procedure and remove the regulatory decisions from the purely political decisionmaking process. It created a more rational and somewhat judicialized administrative process.

Finally, let me add one additional comment. I will not spend much time on this because my mentor sitting to my left, now a dis-

tinguished judge on the U.S. Court of Appeals and also a former Chairman of the Administrative Conference, can address the issue better than I. But it does seem to me that the framers of the Constitution created our tripartite system for very definite and conscious reasons, which the last panel discussed.

It is important to remember that the framers of the Constitution were explicitly rejecting the system that had grown up in England at the time of the American Revolution. In England, by that time, there was no tripartite structure. Parliament had gained supremacy. The King was primarily an agent of Parliament. He had some real power at that time, but the Parliament was the dominant force in the English system. The colonists' grievances were really with the Parliament. In fact, in the Declaration of Independence, the King was the nominal target of the declaration, but the real target was the Parliament.

The framers opted for a system dating back to 16th century England in which there was a real separation of powers. There was a judicial branch, an executive branch, and a legislative branch.

It seems to me that that is the genius of our system. It is the best system man has ever devised; a system that has, more than any other, protected individual liberty and those fundamental values of a decent, civilized life, and has allowed enormous human progress.

Even today, in probably the next freest system in the world, the English system, many of those liberties are not protected to the same degree. A recent former editor of the Times of London was speaking in this country recently. When asked on a show about 2 weeks ago how press freedom compares in England with that in the United States, he said the English press is about half as free as the press in this country.

So it seems that when we start tampering with the system established by our Constitution, we should be very, very cautious. It is a magnificent system of government.

As for the amendment before you, let me say that, while I have a great deal of sympathy with Senator DeConcini's aims, and I think the problem that he is addressing is a real problem and one which we must address. But it must be recognized that the amendment may fundamentally alter our present constitutional system. Also, the Conference, as I said, believes the legislative veto presents, among other things, functional or practical problems for Congress and the agencies. Speaking personally, I think that before adopting any constitutional amendment, we should give very serious consideration to the effect that it will have on our governmental system, to avoid upsetting that very delicate balance which has worked so well.

Senator, thank you very much. I hope I have not spoken too long.
Senator DeConcini. Thank you.

Mr. Smith. I will answer any questions I can.

[The following material was received for the record:]

PREPARED STATEMENT OF LOREN A. SMITH

Mr. Chairman and Members of the Committee:

I am Loren A. Smith, Chairman of the Administrative Conference of the United States. I want to thank you for the invitation to testify before your committee. I am accompanied by Richard K. Berg, our General Counsel.

The Administrative Conference is a Federal agency whose statutory mission is to perform studies and recommend improvements in the administrative procedures used by Federal departments and agencies, 5 U.S.C. § 574. We try to assist the agencies and Congress in developing procedures that provide greater fairness and expedition for participants in the administrative process, more effective attainment of agencies' goals, and lower costs to the taxpayers.

The Administrative Conference has 91 members, approximately 50 from the departments and agencies in the Federal Government and 40 from the private sector and State or local government. The 91st member is the Chairman, who is appointed by the President with the advice and consent of the Senate. The Conference takes formal positions only through the votes of our membership at our semiannual plenary sessions.

I am here to discuss with you Senate Joint Resolution 135, a proposed constitutional amendment which would overturn the Supreme Court's decision in INS. v. Chadha by permitting Congress by statute to impose either a one-House or a two-House legislative veto on any "Executive action" performed under what the resolution terms "legislatively delegated authority."

Let me confess at the outset that I approach the subject of this proposed amendment with some diffidence. First, as an institutional matter, the Administrative Conference has refrained from taking positions on basic questions of allocation of power between the Executive and the Legislative Branches. Our mission, as I have said, is to advise both branches on questions of administrative procedure. Under our statute neither "the scope of agency responsibility as established by law" nor "matters of substantive policy committed by law to agency discretion" are within our concern, and the legislative veto embodied in the resolution is certainly a form of limitation on the scope of agency responsibility. Furthermore, and, I think, more to the point the question posed by the resolution before you is not so much one of good versus bad procedure as one of political theory. Is it desirable that this power be vested in the Congress or is it not? I am not sure that on such a question, a body of administrative lawyers has much expertise to offer.

I have another reason than the Conference's institutional neutrality for approaching this proposal somewhat hesitantly. As an administrative lawyer and a student of government, I am presented with a difficult choice. As you no doubt are aware, the Chadha decision, particularly in the light of the Court's summary dispositions of the subsequent FERC and FTC cases,¹ appears to draw a sharp and uncompromising line against any statutory mechanism for approval or disapproval of Executive action by one or both Houses of Congress or, by necessary extension, by a Congressional committee or officer. Therefore, to legitimize any such device, a constitutional amendment is necessary. I can think of some circumstances in which a legislative veto mechanism would be appropriate and useful. Government reorganization legislation is an obvious example. On the other hand, it is impossible to dissociate this proposal entirely from recent legislative proposals to make the legislative veto a more or less integral part of the agency rulemaking process. I strongly believe that administrative agencies must be accountable both to Congress, the author of our laws, and the President, who executes those laws. Congress has an obvious interest in providing guidance and direction to the agencies in their administration of the laws, to correct them where they misapply the Congressional intent or even where Congress has itself thought better of its previous judgment. But I have grave doubts regarding the desirability of the legislative veto as a standard element of agency rulemaking.

I have said that the Administrative Conference tries to avoid taking positions on questions of the allocation of power between the branches. However, where such questions have procedural implications, we feel free to speak. For this reason in 1977 the Administrative Conference, while taking no position on the constitutional issue since resolved by Chadha, criticized proposals then pending to attach legislative veto mechanisms to agency rulemaking authority generally. The Conference recommendation pointed to procedural problems that any broadly applicable legislative veto mechanism would be likely to create and urged that Congress not "in general legislation or as a routine practice, provide for prior submission of agency rules for Congressional review and possible veto."

¹/ Process Gas Consumers Group v. Consumers Energy Council of America, 103 S. Ct. 3556 (1983).

The Conference has not issued any formal statement since 1977 on the subject of the legislative veto. However, at our plenary session last December we had a presentation and general discussion on legislative review alternatives in the wake of the Chadha decision. Our consultant, Professor L. Harold Levinson of Vanderbilt University, submitted a paper in connection with that presentation, which I am submitting with my testimony. It is entitled Congressional Oversight of Agency Rulemaking: Options Available after Chadha (Dec. 1, 1983). Professor Levinson is a nationally recognized authority on state administrative procedure, and he brought a fresh and perhaps unique perspective to bear on the issues. I think the general debate that followed will also contribute to the effort to develop a response to the Chadha decision. The transcript is still being edited, but when it is ready I shall submit it to the committee.

To return to the question of the desirability of a constitutional amendment to overturn Chadha, I suppose where I come down is that while I appreciate the advantage of permitting flexibility in arrangements between the Executive Branch and Congress, particularly where extraordinary grants of authority are involved, I fear the authority granted to Congress by S.J. Res. 135 would be overused. Therefore, I would like to see further consideration of other devices, such as joint resolutions considered under expedited procedures, as in Senator Grassley's amendment to S. 1080, before we resort to amending the Constitution.

I am particularly doubtful of the desirability of an amendment authorizing a one-House veto, for I believe such a device simply invites deadlock. Of course, if the target is Executive action imposing new regulation in a previously unregulated area, perhaps one could defend a one-House veto. But most regulatory actions, even major actions, are not of this kind. They are usually adjustments of the relations among previously regulated interests. A good example is the present dispute over the long distance access charge. In such a situation with a one-House veto provision in effect if the Senate and the House of Representatives were in disagreement, it might be impossible for the administering agency to take any action.

I have some additional comments directed to the text of S.J. Res. 135. I understand that the intent is simply to remove the obstacles to legislative veto presented by the Chadha case, that is to say, the requirement in Article I, Section 7, Clause 3, that Congressional actions having legislative effect must be presented to the President. However, it must be recalled that as a constitutional amendment, S.J. Res. 135, if

adopted, would supersede any other provision of the Constitution with which it might conflict, including the due process clause of the Fifth Amendment and the prohibition of bills of attainder. I think it would clarify the scope of the resolution to add at the beginning the words, "Notwithstanding Article I, Section 7, Clause 3, . . ." This would make clear that any other constitutional inhibition on the device in question would continue to be applicable.

This would not resolve all questions of overbreadth of the amendment, however. The amendment would apply to "Executive action under legislatively delegated authority." This would certainly exclude actions of the President under authority granted directly by the Constitution, such as his authority as Commander in Chief, his pardoning power, or his authority over foreign relations. But the great majority of the actions of the President and his subordinates are taken under statutes which empower or direct them to do thus and so. The power to execute the laws is itself drawn from the Constitution, but the phrase "Executive action under legislatively delegated authority" seems to suggest a distinction between merely executing the laws, as by instituting prosecutions, and action under a legislative delegation. Let me point out that such a distinction will prove slippery at best. The question is addressed in the Chadha opinion, where the Court states, "When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it. [citation omitted] When the Executive acts, it presumptively acts in an executive or administrative capacity as defined in Art. II." 103 S. Ct. at 2784. With respect to the very situation at issue in Chadha, the Court described the determination of the Attorney General that the alien should remain in the United States as taken "in the exercise of legislatively delegated authority." Nevertheless, in the Court's view it was an act of executive and not legislative power, 103 S. Ct. at 2785.

If the phrase "Executive action under legislatively delegated authority" is intended to include all statutory grants of authority to Executive officers, I submit that the amendment sweeps far too broadly and carries within itself the potential for vastly altering our system of separation of powers. If, on the other hand, it is attempting to draw a distinction between those actions which might on a functional analysis be characterized as executive and those which might be considered "quasi-legislative," then the words are poorly chosen. The phrase "in the exercise of legislatively delegated authority" appears, as I have said, in the Chadha opinion, where it refers to a decision of the Attorney General to suspend the deportation of a specific alien. This was so far from

being a "legislative" determination that Justice Powell, in his thoughtful concurring opinion, was prepared to hold the legislative veto procedure in question unconstitutional on general separation of powers grounds, quite independently of the Presentment Clause argument. 103 S. Ct. at 2791.

I suggest that if the proposed amendment is to be limited in its application to quasi-legislative actions by administrative agencies, it might be better to take the drafting approach of House Joint Resolution 313 which authorizes either House "to veto rules and regulations issued by the Executive Department pursuant to laws passed by Congress." This would not, of course, be a complete answer to what is, in fact, a difficult drafting problem. "Rule" would have to be defined, since the definition in the Administrative Procedure Act is too broad for what I assume the proponents of the amendment have in mind. But I think a workable definition could be formulated and that it would provide a useful refinement of the scope of the proposed amendment.

I am grateful for this opportunity to share with you my thoughts on this important proposal. I am sure the coming months will see a useful discussion on appropriate responses to the Chadha decision. The Administrative Conference hopes to contribute to this discussion, and we stand ready to assist this Committee and its staff in any way that we can.

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RECOMMENDATION 77-1: LEGISLATIVE VETO
OF ADMINISTRATIVE REGULATIONS
(Adopted September 15-16, 1977)

Congress has by statute occasionally required that certain agency actions be subject to Congressional approval or disapproval before they became effective. Several proposals have now been advanced which would apply this procedure to all substantive rules issued pursuant to the notice-and-comment procedures of 5 U.S.C. §553 (which are not subject to 5 U.S.C. §§556 and 557). These proposals typically would provide that if either house of Congress disapproved a proposed rule within a specified period, such as 60 days, it would not take effect.

The Conference believes that this kind of legislative veto would not further the ability of Congress to direct agency policy; moreover, it would bring about undesirable changes in the rulemaking process and in relationships among the agencies, Congress, and the courts.

1. Agencies. Legislative veto proposals contemplate postponing the effective date of most agency rules for two months beyond the present statutory period of thirty days that must elapse between their publication in the Federal Register and their taking effect. This additional period is prescribed so that Congress may have opportunity to exercise the power of review. The volume of existing agency rulemaking and the technical or noncontroversial nature of many rules suggest, however, that few proposed rules would in fact receive specific Congressional attention. Nevertheless the operation of the great mass of rules, whether or not actually considered by Congress, would be postponed without corresponding benefit and often with unfortunate public consequences. In instances when Congress did undertake review, it would risk engaging in piecemeal examination of particular rules, in isolation from an agency's program as a whole, and without benefit of the experience and specialized knowledge that had shaped the elements of that program. Of great concern is the possibility that Congressional review of administrative agencies' rules would significantly diminish the importance of the procedures now prescribed by law to assure public participation in rulemaking. Rules that survive active legislative review are likely to be based upon negotiations with Congressional units rather than upon the information, expression of opinion, research materials, and background experience that shaped the agency's policy.

2. Congress. Legislative review of substantive rules would increase the workload of Congress substantially. Review of complex, technical rules would be difficult, time consuming, and often impracticable. Yet, in the belief that each agency's work product would have to undergo later scrutiny by Congress or its committee staffs, Congress might be more ready even than at present to delegate power in broad terms and to avoid specificity and precision in formulating legislative policies that guide agency discretion. Piecemeal review, moreover, might create a misleading impression that Congress has endorsed by implication whatever it has not explicitly disapproved. Were that impression to become widespread, Congress might be deemed to have accepted a responsibility of unforeseen dimensions.

3. Courts. A procedure for Congressional review of agency rules may also imply legislative ratification of rules not disapproved by Congress. If legislative approval is inferred from inaction by Congress under the proposed procedure, then the scope of judicial review may be reduced without provision of an adequate substitute. Existing constraints on agency rulemaking discretion would therefore be lessened in a manner not intended by Congress.

The objectives of a generic requirement of legislative review of administrative rules can be realized by careful delineations of basic Congressional policy, by particularized statutes addressed to specific issues, and by Congressional hearings focused on review of agency policy rather than on details. Careful attention to appointments and appropriations constitutes a further effective means of maintaining Congressional oversight of agencies' use of delegated power.

Recommendation

The Conference urges that Congress should not, in general legislation or as a routine practice, provide for prior submission of agency rules for Congressional review and possible veto.

CONGRESSIONAL OVERSIGHT OF AGENCY RULEMAKING:

OPTIONS AVAILABLE AFTER CHADHA

Submitted to the Administrative Conference of the United States

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December 1, 1983

This report is an expanded version of two earlier drafts with the same title, submitted to the Administrative Conference of the United States on July 27, 1983 and September 1, 1983 respectively. The report draws substantially upon an earlier report entitled "Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives," submitted by the same reporter to the Administrative Conference of the United States in 1982, and subsequently adapted and published in 24 Wm. & Mary L. Rev. 79 (1982).

This report was prepared for consideration by the Administrative Conference of the United States. It represents only the views of the reporter, not necessarily those of the Conference. The report should not be quoted or attributed without reference to this disclaimer.

1. INTRODUCTION

The Supreme Court invalidated various types of "legislative veto"¹ systems in INS v. Chadha, decided on June 23, 1983,² and in a group of companion cases decided without opinion on July 6, 1983.³ The combined result of these cases is that a legislative veto system is unconstitutional, whether the affected agency action is adjudication or rulemaking,⁴ whether the agency is an executive department or an independent commission,⁵ whether the veto is by a single House or by a concurrent resolution of both Houses of Congress,⁶ and whether

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1. The Supreme Court has noted that the term "veto" has come into common use to describe the type of device that was at issue in the Chadha case. INS v. Chadha, 103 S. Ct. 2764, 2771 n. 2 (1983).
 2. INS v. Chadha, 103 S. Ct. 2764 (1983).
 3. Consumer Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982), *aff'd sub nom. Process Gas Consumers Group v. Consumers Energy Council of America*, 51 LW 3935 (U.S. 1983); Consumers Union, Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982), *aff'd sub nom. U.S. Senate v. FTC*, 51 LW 3935 (U.S. 1983).
 4. The agency action was adjudication in Chadha and rulemaking in the companion cases cited *supra*, note 3.
 5. The affected agencies in the cases cited *supra*, notes 2 and 3, are the INS, FERC and FTC.
 6. Chadha and Consumer Energy Council involved a one-house veto; Consumers Union involved a two-house veto; *supra*, notes 2 and 3.

the veto is interposed before or after the agency action has become effective.⁷

Neither Chadha nor the companion cases involve the specific constitutional attributes of the President, such as the presidential power as commander-in-chief,⁸ foreign affairs organ,⁹ or grantor of clemency.¹⁰ Thus, the cases do not appear to control in systems such as that established by the War Powers Resolution,¹¹ which attempts to accommodate the constitutional powers of the

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7. In Chadha the veto was interposed after the agency action had become effective. In the two companion cases cited in note 3, *supra*, the veto was interposed before the agency action had become effective, and the veto was intended to prevent the agency action from ever becoming effective. Chadha also appears to overrule, by implication, the decision of the closely divided Court of Claims in Atkins v. United States, 555 F.2d 1028 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978). The statute at issue in Atkins provided that the President's recommendations for changing the salaries of certain government officials would become effective unless either house of Congress adopted a resolution of disapproval within thirty days. The statute may be viewed, either as a delegation of authority to the President to change the salaries, subject to a one-house veto, or as a congressional declaration that its silence during thirty days after a presidential recommendation is tacit approval of the recommendation. Under either view, the statute does not appear to remain valid under the Chadha holding.
 8. U.S. Const., Art. II, Sec. 2, cl. 1.
 9. U.S. Const., Art. II, Sec. 3.
 10. U.S. Const., Art. II, Sec. 2, cl. 1.
 11. P.L. 93-148 § 5, 87 Stat. 555, 556-57 (1973), 50 U.S.C. 1544. This resolution is included in a compilation of statutes which contain legislative veto features, appended to the dissenting opinion of Justice White in Chadha, 103 S. Ct. at 2792, 2811. This compilation, based on the brief for the United States Senate, summarizes the War Powers Resolution as follows: "Absent declaration of war, President may be directed by concurrent resolution to remove United States armed forces engaged in foreign hostilities." The present reporter, for reasons indicated in the text accompanying this footnote, does not regard the Chadha decision as rendering the War Powers Resolution invalid.

President as commander-in-chief with the constitutional power of Congress to declare war.¹² The cases all involve statutes in which Congress delegated authority to an agency, while at the same time reserving the power of one or both Houses of Congress to exercise a veto over the agency's exercise of that delegated authority. The Court stated in Chadha:¹³ "Congress must abide by its delegation of authority until the delegation is legislatively altered or revoked." This appears to be the holding of the companion cases as well as Chadha. When Congress delegates authority to an agency, Congress may not attach a reservation that would allow one or both Houses to exercise a legislative veto. Congress retains its power to enact a new statute, which must be presented to the President for approval or veto, and which can modify or repeal the authority that was delegated to the agency by the old statute.

Similar decisions had been reached by all state supreme courts that had addressed the issue,¹⁴ although the United States Supreme Court did not mention these state court precedents in Chadha. The courts of Alaska,¹⁵ New

12. U.S. Const., Art. II, Sec. 2, Cl. 1; Art. I, Sec. 8, cl. 11.

13. 103 S. Ct. at 2786.

14. See generally Levinson, Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives, 24 Wm. & Mary L. Rev. 79, 83 (1982) (hereinafter cited as "Legislative and Executive Veto").

15. State v. A.L.I.V.E. Voluntary, 606 F.2d 769 (Alaska 1980).

Hampshire,¹⁶ New Jersey¹⁷ and West Virginia¹⁸ had held, before Chadha, that an agency performs an executive function when it carries out the mission for which the legislature delegated authority. The legislature may always repeal or amend the delegation of authority by enacting a new statute, pursuant to the procedure prescribed in the state constitution which requires concurrence of both houses of the legislature and presentment to the governor for approval or veto. The legislature may also exercise its traditional indirect control over agencies, by methods such as appropriations, investigations, participation in appointments, and follow-ups on constituents' casework. The legislature may not, however, establish a system under which a resolution of one or both houses, without presentment to the governor, could nullify the action of an agency in the exercise of its delegated authority.

The Connecticut Constitution was amended in November 1982, to validate that state's legislative veto system.¹⁹ In a number of other states, legislative

16. Opinion of the Justices, 431 A.2d 783 (N.H. 1981).

17. General Assembly v. Byrne, 448 A.2d 438 (N.J. 1982), holding that an across-the-board system of legislative veto violates the state constitution. But see the companion case of Enourato v. New Jersey Building Authority, 448 A.2d 449 (N.J. 1982) sustaining a statute which provided for a two-house veto of certain decisions of the Building Authority, based on the court's conclusion that the veto was a necessary component of a system of cooperation between the executive and the legislature. One feature of the system was that the governor had statutory power to veto all actions taken by the Building Authority.

18. State ex rel. Barker v. Manchin, 279 S.E.2d 622 (W. Va. 1981).

19. Conn. Const., Art. II (as amended Nov. 1982).

veto systems exist without express validation by the state constitution and without any judicial resolution of the constitutional issue.²⁰ Most states, however, provide mechanisms other than the legislative veto, as means of maintaining legislative oversight of agency actions.²¹ Where pertinent, the models found in various states are noted in this report.

Chadha and the state legislative veto cases carry important implications regarding the power of the President or governor to supervise the agencies. If an agency's performance of its delegated authority is indeed an executive function, that function arguably falls within the supervisory power of the President or governor, under the constitutional mandate that requires the chief executive to take care that the laws are faithfully executed. Of course the legislature can, if it wishes, expressly authorize the President or governor to supervise all or some of the agencies. But even without statutory authority, the President or governor may be in a position to claim, under Chadha and the state cases, a constitutional basis for supervising all agency action that is classified as being "executive." This aspect of Chadha will be addressed again later in this report.

20. A one-house veto is provided by Okla. Stat. Ann. tit. 75, § 308. Two-house vetoes are provided by Conn. Gen. Stat. § 4-168(b); Idaho Code §§ 67-454, -5217, -5218; Ill. Ann. Stat. ch. 127, §§ 1007.01-.10; Kan. Stat. Ann. §§ 77-426, -.47; La. Rev. Stat. Ann. § 49.969; Mich. Comp. Laws Ann. §§ 24.235, -.245, .250-252; Mont. Code Ann. §§ 2-4-401 to -412, 5-14-101; Nev. Rev. Stat. §§ 233B.067, .068; Ohio Rev. Code Ann. § 119.03(H), (I); Va. Code § 9-6.14:9. Additional states have two-house veto systems that apply only to limited agencies or functions. Legislative and Executive Veto, *supra* note 14, at 81-82.

21. See generally Legislative and Executive Veto, *supra* note 14.

Congress may consider a wide range of optional responses to Chadha. One type of response is to ignore or even defy the Supreme Court's decision. A mild flurry of defiance is indicated by the statutes containing legislative veto provisions that have been enacted since Chadha.²² Some statutes containing legislative vetoes — whether enacted before or after Chadha — may escape judicial review for lack of a plaintiff with standing or for other reasons that prevent the courts from exercising review.²³ One view is that Congress and the agencies can justifiably enact and implement any statute until the Supreme Court has directly held that very statute unconstitutional, even though the statute obviously violates the holding of prior Supreme Court decisions regarding

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22. The power to veto specific types of agency action is conferred upon the appropriations committees by Department of Housing and Urban Development — Independent Agencies Appropriations Act, 1984, P.L. 98-45, 97 Stat. 219 (July 12, 1983); Supplemental Appropriations Act, 1983, P.L. 98-63, 97 Stat. 301 (July 30, 1983); and Department of Transportation and Related Agencies Appropriations Act, 1983, P.L. 98-78, 97 Stat. 453 (Aug. 15, 1983). Other post-Chadha statutes containing legislative veto provisions are National Aeronautics and Space Administration Authorization Act, 1984, P.L. 98-52, 97 Stat. 281 (July 15, 1983) (conferring the veto power upon the authorizing committee) and Caribbean Basin Recovery Act, P.L. 98-67, 97 Stat. 384 (Aug. 5, 1983) (authorizing the President to suspend duty-free treatment and proclaim a duty rate subject to section 203 of the Trade Act of 1974, which provides for a concurrent resolution of disapproval). These statutes were compiled in a listing submitted by Louis Fisher, Congressional Research Service, Library of Congress, to the Committee on Rulemaking of the Administrative Conference of the United States at its meeting on September 16, 1983. The listing was based on statutes enacted through P.L. 98-88.

In another action that appears inconsistent with the Chadha decision, the Senate adopted a resolution on Sept. 20, 1983 to impose a moratorium on the sale of coal leases by the Secretary of the Interior. N.Y. Times, p. 15 (Sept. 21, 1983).

23. This possibility is discussed in the remarks by Congressman Moakley, 129 Cong. Rec. H. 4824, 4826-27 (daily ed. June 29, 1983).

other statutes. The contrary view is that Congress and the agencies are ethically bound to conform in good faith to the precedential effect of Supreme Court decisions, and to abandon practices that the Supreme Court's precedents clearly forbid.²⁴

Another type of congressional response is to conduct hearings, create a study commission, or take other measures to examine the impact of Chadha and recommend a response.²⁵ This approach can hardly be criticized, unless it leads to unreasonable delay in taking corrective action.

Any congressional response to Chadha could be either specific (directed to an identified agency or program) or generic (directed to agencies or programs in general). Although most states have enacted generic statutes providing one or another system of legislative oversight of agency rulemaking, the existing federal statutes creating legislative vetoes are all specific and could therefore be changed by specific statutes directed to some or all of the affected agencies or programs. As an alternative, one or more generic statutes could change the existing legislative veto systems and at the same time establish a general framework to facilitate congressional control over all agencies.²⁶ Under a

24. See discussion of the impact of Supreme Court decisions in Levinson, *Book Review*, 1970 *Wis. L. Rev.* 944.

25. Senator Moynihan has introduced a bill to create a study commission. S. 1591, 98th Cong., 1st Sess. (1983).

26. The Senate passed a bill providing for a generic two-house veto, S. 1080, 97th Cong., 2d Sess. § 13 (1982), but the measure died in the House. See Moakley, *supra* note 23, at H 4825.

generic approach, a major issue is whether to treat all agencies uniformly, or to make distinctions among various categories of agencies, depending on whether they are executive departments, independent commissions, or government corporations.

For purposes of analysis and discussion, this report assumes that Congress will take some type of legislative action in response to Chadha, in order to provide effective oversight of agency rulemaking. (Agency action other than rulemaking may also require new types of congressional oversight, as illustrated by Chadha itself, which arose from agency action other than rulemaking, but the present report is limited to a discussion of congressional oversight of rulemaking.) The report devotes most attention to across-the-board, generic types of congressional action in response to Chadha, although some mention is made of specific measures, such as tightly drafted delegations of authority or appropriations riders. The discussion of generic solutions can be readily adapted to analyze the possibility of similar legislation addressed, instead, to specific agencies or programs.

The report explores four groups of models that Congress could feasibly consider, in order to provide effective oversight of agency rulemaking after Chadha and its companion cases. The first group of models focuses on control mechanisms within Congress itself, including the creation of "report and wait" systems of agency rulemaking, with congressional review built into the process. The second group of models examines the possibility that Congress will concentrate its oversight on a single executive agency, which will be the clearing-house through which all other agencies must channel their rules. The third group looks to changes in the system of judicial review as a means of enhancing

congressional control over agencies' rulemaking. Fourth, the report notes the possibility of a constitutional amendment as a solution. The report concludes by describing two options that appear to be the most useful types for congressional follow-up to Chadha. Each of these options consists of a distinctive package of features that are contained in the models discussed earlier in the report. Each optional package is similar to existing systems in some states.

II. MODELS OF CONGRESSIONAL CONTROL

Under the existing system, Congress delegates rulemaking and other powers to an agency. After appropriate procedures, the agency promulgates rules which have the force of law,²⁷ subject to judicial review or to amendment of the enabling statute. The basic congressional control is the power of Congress to enact, amend or repeal the enabling act. Congress wields ancillary powers, such as appropriations, investigations, appointments and follow-ups to constituents' casework. Assuming that the legislative veto is no longer available, Congress can strengthen its control over agency rulemaking by adopting any one or more of the following mechanisms.

A. Tighter Enabling Acts

Congress could put more detail in the enabling acts, thereby reducing the scope of the agencies' discretion. Of course an enabling act should contain a reasonable amount of detail. A serious lack of detail could theoretically be grounds for holding the statute unconstitutional, as an excessive delegation of authority to the agency.²⁸ Even if the statute contains enough detail to pass

27. See, e.g., *United States v. Nixon*, 418 U.S. 683 (1974).

28. Federal courts have tolerated broad delegations to agencies in recent years, e.g., *Amalgamated Meat Cutters & Butcher Workmen v. Connally*,

muster under the delegation test, the statute may still be viewed as unsatisfactory if the amount of discretion conferred upon the agency is "too much," as measured by prevailing political notions about the proper allocation of functions between Congress and the agencies. On the other hand, a highly detailed statute may confer "too little" discretion upon the agencies, and the drafting of this statute may bog Congress down in details that are better left to the agencies.

B. Restrictions on Use of Funds

A related technique is the insertion of restrictions in the authorization or appropriations bills, to limit the purposes for which the agency may use the funds provided by statute. These restrictions could feasibly state that the agency may not use any funds for the purpose of adopting rules that would contain certain types of provisions.²⁹ The functional effect of these restrictions resembles the effect that could be achieved if similar restrictions were written into the enabling act, although the method of processing by congressional committees and the parliamentary procedure to enact the measure may follow a different route.

Continuation of Footnote 28.

337 F. Supp. 737 (D.D.C. 1971), but some state courts hold similar delegations unconstitutional as violations of separation of powers, e.g. *State Compensation Fund v. De La Fuente*, 501 P.2d 422 (Ariz. 1972); *People v. Tibbitts*, 305 N.W.2d 152 (Ill. 1973).

29. See, e.g., the restrictions placed on the power of the Federal Trade Commission to issue trade regulation rules relating to the funeral industry, P.L. 96-252, § 19 (1980), and remarks by Congressman Glickman, 129 Cong. Rec. H 4775-76 (daily ed. June 29, 1983).

C. Sunset

Congress could place time limits on the effectiveness of enabling acts or rules. This would cause the acts or rules to expire at a certain date unless revived by new legislative action.³⁰

D. Congressional Calendar for Agency Rulemaking

Congress could establish an agenda or calendar for the rulemaking of agencies — or at least for the major rulemaking of the major agencies — in which Congress would indicate its priorities and preferences.³¹

E. More Rigorous Rulemaking Procedures

Congress could impose more rigorous rulemaking procedures upon the agencies, such as the requirement that the agency head personally approve all rules, or that rulemaking proceedings be conducted by an independent administrative law judge,³² or that the agency receive and consider input from congressional committees, "public interest" groups, or others.

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30. The Chadha opinion mentions durational limits on the authority granted to agencies, as a legitimate means of congressional control of the agencies. 103 S. Ct. at 2786, n. 19.
 31. This approach is elaborated in R. Litan and W. Nordhaus, *Reforming Federal Regulation* (1983). The proposal deserves serious study, but the present reporter is not convinced of its practicality.
 32. Minnesota gives significant responsibilities to independent administrative law judges in the agencies' rulemaking processes. Minn. Stat. § 15.0411, subd. 3; Auerbach, *Administrative Rulemaking in Minnesota*, 63 Minn. L. Rev. 151 (1979); Harves, *Making Administrative Proceedings More Efficient and Effective: How the ALJ Central Panel System Works in Minnesota*, 65 *Judicature* 257 (1981).

F. Informal Notification and Consultation

A statute could require an agency, before adopting rules, to notify or consult with the appropriate congressional committee(s). The committee would not be able to exercise a veto, but would be able to exercise its traditional powers, such as holding hearings or introducing legislation.³³ The agency would be theoretically free to proceed to adopt a rule, even if the committee or its members had expressed their objections. As a practical matter, however, agencies would be expected to withdraw or modify their proposed rules "voluntarily" in response to the non-binding objections of the committee or its members.

Even without a statute requiring agencies to notify or consult with the appropriate congressional committee(s) before adopting rules, an understanding could prevail, that agencies would voluntarily notify or consult. This understanding could be coupled with the other understanding mentioned above, that the agencies would voluntarily withdraw or modify their proposed rules if the committee or its members objected.

The process of informal notification or consultation — whether required by statute or established by customary practice — is clearly permissible under Chadha, since the system does not purport to authorize a veto by one house, both houses or any committee of Congress. Under the system, an agency is technically at liberty to make its own decisions on how to carry out the authority delegated by Congress, until Congress enacts a new statute.

33. The committee or its members would presumably be at liberty to appear and participate in the agency's rulemaking proceedings, so long as the committee or its members made no attempt to exercise formal control over the outcome.

Some of the practical difficulties raised by the process of informal notification and consultation are its low level of visibility, the possibility of overlap or friction between two or more congressional committees, the lack of adequate staffing of the committees, and the likelihood that some committees or members will be more thorough than others in their oversight of agencies by these informal means. These difficulties are, to a considerable extent, overcome if the process of informal notification and consultation is performed by a centralized committee on oversight of agency rulemaking, rather than by the appropriate congressional committee(s). The centralized committee is discussed next.

G. Establish Advisory Committee on Oversight of Agency Rulemaking

In many states, the legislature has established a joint committee on oversight of agency rulemaking, with advisory powers only.³⁴ The role of the committee is to perform systematic oversight of agency rulemaking and to make recommendations to the legislature for the enactment of any needed statutes to

34. Ark. Stat. Ann. §§ 4-617, 6-608 to -612; Colo. Rev. Stat. §§ 24-4-103(8)(d); Fla. Stat. Ann. §§ 11.60, 120.545; Me. Rev. Stat. Ann. tit. 5 §§ 11111 to 11116; Md. Ann. Code art. 40, § 40A; Mo. Ann. Stat. §§ 536.022, .037; N.J. Stat. Ann. §§ 52:14B-4.1 to 4.9; N.Y. Legis. Law §§ 86-88; Or. Rev. Stat. §§ 183.710 to .725; Utah Code Ann. § 63-46-5.5; Wash. Rev. Code ch. 34.04; W. Va. Code § 29A-3-11; Wyo. Stat. §§ 28-8-102, 29-9-101 to -103. Similar advisory functions are conferred upon the appropriate standing committees in Ga. Code Ann. § 3A-104(e), (f); Hawaii Rev. Stat. § 91-4.1; S.C. Code Ann. §§ 1-23-120 to -130; Tex. Rev. Civ. Stat. Ann. art. 6252-13a, § 5(g).

repeal or amend the authority delegated to any particular agency. An essential part of the functioning of this type of advisory committee is the relationship between the committee's staff and the staffs of the agencies. Negotiations between the two staffs often lead to an agency's voluntary decision to withdraw or amend a proposed rule in response to objections raised by the legislative oversight committee's staff. If negotiations at the staff level do not lead to mutually acceptable results, a member of the legislative oversight committee may be able to negotiate with a member of the agency with satisfactory results. If these informal attempts at settlement fail, the committee can recommend legislation.

Some legislators in states with advisory committee systems appear quite satisfied, while other legislators express frustration at the limited nature of their control over the agencies.³⁵ In view of the use of this system in a number of states, and the satisfaction expressed by many although not all legislators, the advisory committee system should be considered as a major option available to Congress after the Chadha decision. The advisory committee system would not displace any existing congressional committees, although as a practical matter many existing committees would spend less time in the future than they spend now in perusing agency rules, if an advisory committee with an adequate staff was performing effectively.

35. Legislative and Executive Veto, *supra* note 14, at 99.

H. Report and Wait, Without Automatic Effectiveness

In the model system discussed here, an agency submits its proposed rules to Congress. A rule never becomes effective unless Congress enacts a statute to validate the rule. A variation of this model is the proposal to create a "fast-track" joint resolution system for the validation of the rules proposed by agencies.³⁶ At the time an agency's rule is submitted to Congress for approval, a joint resolution to approve the rule is automatically introduced. The joint resolution, requiring concurrence of both houses and presentment to the President, satisfies the Chadha requirement as would a statute.³⁷ The use of the joint resolution permits an expedited parliamentary process,³⁸ which can proceed rapidly unless a committee or a member objects, in which case the process is slowed down, and possibly stalled indefinitely. The slowing down of the process in one house is thus the functional equivalent of a one-house suspension, and the indefinite stalling of the process in one house is the functional equivalent of a one-house veto.

36. Congressman Lott proposed this system, for "major rules," in H.R. 3939, 98th Cong., 1st Sess., § 201 (1983). See also amendment proposed by Congressman Levitas to the Consumer Products Safety Act, H.R. 2668, in 129 Cong. Rec. H 4773-76 (daily ed. June 29, 1983); Breyer, *Legislative Veto After Chadha: The Ryan Lecture* (Georgetown University, October 13, 1983, preliminary draft 21-28.)

37. A footnote to the Chadha opinion observes that legislation need not always be preceded by debate, but must be preceded by the opportunity for deliberation and debate. 103 S. Ct. at 2788, n. 22.

38. The process is described in the sources cited *supra*, note 36.

This proposed system raises many practical difficulties. The power of a committee or a member to slow or stall the process of validating an agency's rule can lead to erratic congressional action. Further, if Congress passes the joint resolution but the President vetoes the measure and Congress sustains the veto, the system results in a presidential veto over the rulemaking of the agency.³⁹ Finally, if a joint resolution is adopted to validate a rule, the courts have no basis for reviewing the rule, except to review the constitutionality of the joint resolution that validated the rule.⁴⁰

The report and wait model, without automatic effectiveness, is not found in the states. It places an obvious burden on the legislature, and it poses special problems when the legislature is not in session, or when emergency circumstances make prompt rulemaking necessary.

39. This result could significantly expand the President's control over the independent commissions; see also *infra*, notes 48-49 and accompanying text.

40. The view expressed here is that of the present author. A contrary approach is reflected in H.R. 3939, *supra* note 36, which provides that the enactment of a joint resolution approving a rule "shall not be construed to create any presumption of validity with respect to such rule and shall not affect the review of the rule" under the Administrative Procedure Act. H.R. 3939, § 201, creating Sec. 807(b), Title 5, U.S.C. The approach taken by H.R. 3939 finds some support in the view expressed by Breyer, *supra* note 36, that judicial review may be preserved if each joint resolution approving a rule includes a clause rendering the joint resolution ineffective "unless the administrative action that initiated it would have been a valid exercise of the delegated authority, absent the confirmatory statute." Breyer at 26. The present author questions whether a court could or would review the conformity of an agency's rule to the authority delegated by the enabling act, after adoption of a joint resolution validating the rule, since the availability of this review would imply that the joint resolution was subordinate to the statute.

One solution could be to incorporate a provision that would allow either House or a committee of either House to give temporary approval to rules during the legislative recess or in emergency situations, pending final approval by statute at the earliest feasible time. The constitutionality of such a statute is questionable. One judicial response would be to invalidate the statute under the Chadha rationale, as a legislative attempt to delegate rulemaking authority to an agency, coupled with a reservation that would allow one House or a committee of one House to participate in the executive task of carrying out the delegated authority. On the other hand, a court might view the temporary role of the one House or committee as being a permissible ancillary function, in aid of the power to enact a statute validating rules.⁴¹

The chances of the system's surviving a constitutional challenge would be increased if the statute contained safeguards. These safeguards could, for example, require the legislative committee or House to follow specified procedures, including public hearings to the extent feasible in the circumstances, and to recite specific findings to justify the exercise of the power of temporary approval. A special majority of the House or committee could be required in order to take this action, and the House or committee could be required to initiate the full legislative process as soon as possible.

Another solution to the practical problems of this model would be to give the agencies themselves the right to use an "emergency exception" to the system. Under this exception, an agency could adopt an emergency rule that would become effective without legislative approval. The rule would remain in

41. See *infra*, note 44.

effect for a limited period of time, and could be either approved or disapproved by statute. The agencies would be discouraged from making unnecessary use of this emergency exception if the statute required an agency to recite findings of fact to justify the use of emergency rulemaking,⁴² and possibly to obtain the approval of the President (or other senior executive officer) before using emergency rulemaking.

I. Report and Wait, With Automatic Effectiveness

Under another report-and-wait model, the agency would submit its proposed rule to Congress. The rule would become effective automatically after a period of time specified by statute, but Congress could enact a statute or joint resolution before the end of the waiting period, to do any of the following: (1) disapprove the rule before it becomes effective, (2) expedite the effective date, or (3) suspend or delay the effective date.

This model is found in some pending proposals in Congress, as well as in the statutes of some states.⁴³ The state statutes include special provisions for temporary action by one House or a committee of the legislature, and for

42. Similar findings are required by the Administrative Procedure Act, 5 U.S.C. § 553(b).

43. See *infra*, note 70, for a listing of states that combine a report-and-wait system with an advisory committee system. The pending congressional proposals include S. 1650, 98th Cong., 1st Sess. (1983) (introduced by Senator Levin); the amendment proposed by Congressman Waxman to the Consumer Products Safety Act, H.R. 2668, 129 Cong. Rec. H 4771-73 (daily ed. June 29, 1983); the amendment proposed by Senator Kasten to the Federal Trade Commission Act, S. 1714, 129 Cong. Rec. S 13110-11 (daily ed. Sept. 28, 1983); and provisions regarding "minor rules" in H.R. 3939, 98th Cong., 1st Sess., § 201 (1983) (Congressman Lott).

emergency rulemaking by the agency. Temporary action by one House or a committee of the legislature could have practical utility, either to expedite the effective date of a rule, or to suspend the effective date beyond the normal waiting period. Suspension can be especially important if an agency submits a proposed rule during the interim between legislative sessions, or if the legislature for any reason requires more time for deliberation than is provided by the standard waiting period. No reported state case has decided whether the temporary suspension of a rule by one House or a committee violates the basic separation of powers principle articulated in Chadha and the four state court opinions, or is acceptable as an ancillary measure in aid of pending action by statute. In dicta, two of the four state courts addressed the issue, and reached opposite conclusions.⁴⁴ Constitutional amendments have been adopted in Michigan⁴⁵ and South Dakota,⁴⁶ expressly authorizing legislative committees to order the temporary suspension of rules that were adopted by agencies during the interim between legislative sessions.

A provision giving one House or a legislative committee the power to order temporary suspension of an agency's rule would stand the best chance of surviving constitutional attack if safeguards were built into the system, such as

44. The New Hampshire court, *supra* note 16, implied in dictum that the committee suspension feature of the statute was not objectionable. The West Virginia court, *supra* note 18, expressed in dictum its disapproval of the committee suspension concept.

45. Mich. Const., Art. 4, Sec. 37.

46. S.D. Const., Art. III, Sec. 30.

the following:⁴⁷ (1) suspension could be ordered only for a limited time, and this time period could be tolled while the legislature was in recess; (2) suspension could be ordered only on grounds specified in the statute, such as that the rule is contrary to legislative intent as expressed in the enabling act; (3) the suspension order must express the grounds; (4) the one House or committee must follow specified procedures (such as public hearings) before issuing a suspension order; (5) a special majority may be required for one House or a committee to issue a suspension order; and (6) following the issuance of a suspension order, the one House or committee must promptly initiate the process for legislation, and that process must be expedited.

With regard to emergency rulemaking by agencies, and to temporary action by one House or a legislative committee to expedite the effective date of a rule, see discussion of similar topics under the preceding heading.

III. MODELS OF EXECUTIVE CONTROL

Congressional control of agency rulemaking may be most effective if Congress concentrates its oversight on a single federal superagency, which will be the clearinghouse through which all other agencies must channel their rules. The superagency would be in the executive branch, and would conduct its own review of the rules of all agencies, subject to further review by one or more appropriate congressional committees and, ultimately, by Congress itself. By

47. These safeguards are based on elements found in a number of state statutes.

providing a single agency as a target for congressional oversight of agency rulemaking, the superagency concept may give Congress the only practical control device left open by Chadha and its companion cases.

The superagency concept is already in place, to some extent, in the federal government as well as in some states. At the federal level, Executive Order 12291 requires executive departments to submit their rules to the Office of Management and Budget for clearance before promulgation.⁴⁸ The Executive Order requests the voluntary participation of the independent commissions in this process, but the commissions have not chosen to participate. One result of Chadha may be an attempt by the President to require all independent as well as executive agencies to comply with the Executive Order, on the theory that Chadha and its companion cases classify rulemaking by independent commissions as being part of the executive function of carrying out the laws, and that the President's constitutional duty to make sure that the laws are faithfully executed entitles and even requires the President to supervise every agency that shares in the execution of the laws.⁴⁹

In addition to its superagency powers under the Executive Order, OMB also possesses a limited range of superagency powers conferred by statute. Of special interest is the Paperwork Reduction Act, which requires all agencies'

48. Exec. Order No. 12291, 46 Fed. Reg. 13193 (1981), discussed in Legislative and Executive Veto, *supra* note 14.

49. Legislative and Executive Veto, *supra* note 14, at 107-09.

forms to be cleared through OMB before adoption.⁵⁰ The Act prohibits OMB from using this power as a means of controlling agency policy. Further centralized power over the agencies is wielded by OMB in the performance of its budgetary and managerial functions.⁵¹

If Congress wished to confer rule clearance responsibilities upon a superagency, OMB would be an obvious candidate, because of its existing functions, including those noted above. A statute could require OMB to perform its existing functions in a manner that would maximize congressional control over them, and could also expand OMB's functions to include all rule clearance. The use of OMB for this purpose might, however, be troublesome because of OMB's close connection with the White House. Congress might prefer to create a new superagency in the executive branch, to perform rule clearance and possibly some other functions. A new agency would duplicate, to some extent, the existing functions of OMB, much as the Congressional Budget Office duplicates some other functions of OMB.⁵² The President might see fit to reduce this duplication by rescinding the Executive Order, leaving the new superagency with the sole responsibility for rule clearance.

If Congress creates a new superagency for rule clearance and possibly other purposes, the new agency will have to be clearly identified as an executive

50. 44 U.S.C. § 3501 et seq.

51. 31 U.S.C. § 501 et seq.

52. 2 U.S.C. § 601 et seq.

agency, in order to satisfy the Chadha requirements. This would evidently require that the head of the new agency be appointed by the President. Congress would presumably require Senate confirmation of this vital appointment.

The statute creating the superagency (or conferring rule clearance powers on OMB) should include a number of safeguards to confine the discretion of the superagency. For example, the statute should provide: (1) time limits for superagency action; (2) grounds on which the superagency can disapprove of a proposed or existing rule (such as that the rule is contrary to legislative intent as expressed in the enabling statute); (3) a requirement that the superagency express the grounds for any action it takes; (4) specified procedures (such as public hearings if feasible) that the superagency must follow; (5) prompt reporting by the superagency to the appropriate congressional committee(s); (6) prompt congressional action if required; and (7) effective congressional oversight of the superagency.

As an alternative to the superagency concept, Congress may consider the formation of a number of groups of agencies. Each group would consist of one lead agency and a number of subordinate agencies.⁵³ The lead agency would

53. The lead agency concept could be adopted, either selectively to deal with specific agencies, or generically to apply to the entire executive/administrative apparatus of the federal government. The generic application of this concept would conform to the "span of control" theory which is reflected, for example, in the Florida Constitution, Art. IV, Sec. 6, limiting the functions of the state's executive branch to not more than 25 departments in addition to those expressly mentioned in the constitution. After adoption of this constitutional provision in 1968, the Florida legislature reorganized the more than 150 pre-existing agencies so as to consist of not more than the maximum allowable number of departments, which serve as lead agencies for the remaining agencies. Fla. Stat. ch. 20.

serve as clearinghouse for the rulemaking of the subordinate agencies in the same group. Congress would be able to focus its oversight on the relatively small number of lead agencies.

In the states, the superagency concept has been highly developed in the California Office of Administrative Law, which reviews all proposed rules before their effectiveness and can also review existing rules.⁵⁴ If the OAL rejects a proposed rule, the rule cannot become effective unless the agency persuades the governor to reverse the OAL. In three other states, rules cannot become effective until the governor approves them.⁵⁵ Many states provide for advance clearance of proposed rules by the attorney general.⁵⁶ Under the 1981 revision of the Model State Administrative Procedure Act⁵⁷ and in some states,⁵⁸ rules

54. Cal. Gov. Code §§ 11349-11349.9; Cohen, *Regulatory Reform: Assessing the California Plan*, 1983 Duke L.J. 231; Price, *Executive Control of Rulemaking: The Office of Administrative Law in California*, Report to the Administrative Conference of the United States (1981); Starr, *California's New Office of Administrative Law and Other Amendments to the California APA: A Bureau to Curb Bureaucracy and Judicial Review*, Too, 32 Ad. L. Rev. 713 (1980). For a recent update, see Mattesich, *Regulatory Reform in California*, 8 Ad. L. News, No. 4 at 1 (Summer 1983).

55. Hawaii Rev. Stat. § 91-3(c); Neb. Rev. Stat. § 84-908; Wyo. Stat. § 28-9-106.

56. Legislative and Executive Veto, *supra* note 14, at 109.

57. National Conference of Commissioners on Uniform State Laws, *Model State Administrative Procedure Act (1981 Revision)* § 3-202 (hereinafter cited as 1981 MSAPA). The 1981 MSAPA is in 14 Unif. Laws Ann. 149 (West ed. 1982 Supp.)

58. Ind. Code Ann. § 4-22-2-5; Iowa Code Ann. § 17A.4(6); La. Rev. Stat. Ann. § 49:970; Mo. Ann. Stat. § 536.022; and, for limited categories of rules, Nev. Rev. Stat. § 416.060.

become effective when adopted by the agency, but can be vetoed by the governor.

Two basic models of the superagency concept can be designed. In one model, the superagency promulgates or approves all rules. In the other, the superagency can veto or suspend existing rules.

A. Superagency Promulgates or Approves All Rules

In this model, no agency rule would become effective unless promulgated or approved by the superagency. The agencies would therefore submit all proposed rules to the superagency for promulgation or approval. The model could possibly include additional features: (1) to allow the President to override the superagency upon the appeal of an agency whose proposed rule was rejected by the superagency; (2) to allow agencies to promulgate emergency rules, effective for a limited duration pending review by the superagency; and (3) to allow the superagency to give tentative approval to an agency's emergency rule, allowing that rule to take effect for a limited duration even though the regular review process of the superagency has not been completed.

On the possible coexistence of this model with the model under which the superagency can veto or suspend existing rules, see discussion under the next heading.

3. Superagency Can Veto or Suspend Existing Rules

This model would empower the superagency to veto or suspend the effectiveness of existing rules. This model could be adopted either with or without the previous model, as follows:

1. If this model (superagency can veto or suspend) is adopted in addition to the previous model (superagency promulgates or approves all rules), the

superagency will promulgate or approve all rules proposed by agencies after the new system becomes effective, and in addition the superagency will be able to veto or suspend any rules that agencies had adopted before the new system became effective.⁵⁹ (Possibly, the superagency would also be able to take a second look at rules that it previously promulgated or approved, and to veto or suspend them as a result of this second look, although this possibility raises questions as to the consistency of the superagency's exercise of its powers.)⁶⁰

2. If this model (superagency can veto or suspend) is adopted without the previous model (superagency promulgates or approves all rules), the agencies will retain their power to adopt rules. The rules will go into effect, either when adopted by the agency or after a waiting period specified by statute that will give the superagency time to exercise its review. The superagency will have the power to veto or suspend an agency's rule.

The model could possibly include features similar to those suggested in connection with the previous model, regarding presidential power to override the superagency, special agency power to adopt emergency rules, and power of the superagency to give tentative approval to an agency's emergency rule.

59. When adopting legislative veto or other oversight systems, many states have made the system applicable to all rules proposed after the system becomes operational, and also to all rules that were in effect at that date.

60. On the problems arising from an agency's change of policy, see *Motor Vehicle Manufacturers Assn. of the United States, Inc. v. State Farm Mutual Automobile Ins. Co.*, 103 S. Ct. 2856 (1983).

IV. MODELS OF JUDICIAL CONTROL

Congress could increase its control of agency rulemaking by making some changes to the statutory provisions on judicial review of rulemaking.

A. Standing of Congressional House or Committee to Challenge Rule, Etc.

A statute could confer standing upon either House of Congress, or upon any appropriate congressional committee, to seek judicial review of any rule, proposed rule, rejection of a proposed rule, or other rulemaking action of an agency (or superagency).

At some point, a statute of this type would raise constitutional questions as to existence of a "case and controversy" requisite for the exercise of judicial power.⁶¹ It appears, however, that the ability of Congress or its committees to obtain judicial review could be expanded by statute to some extent beyond its present level.

B. Congressional Committee Objection Shifts Burden in Litigation

The 1981 revision of the Model State Administrative Procedure Act establishes an advisory legislative committee to perform oversight of agency rulemaking.⁶² If this committee objects to an agency's rule but the agency

61. The Chadha decision allowed the two Houses of Congress to litigate as adverse parties, 103 S. Ct. at 2773-74, notes 5-6. This aspect of Chadha indicates the Court's hospitable approach to granting party status to Congress. It does not define the limits of congressional or committee standing under the "case and controversy" requirement. Exploration of this issue is beyond the scope of the present report.

62. 1981 MSAPA, *supra* note 57, §§ 3-203, 3-204.

adopts the rule despite the committee's objection, the objection must be published with the rule. In any litigation where the validity of the rule is at issue, the agency bears the burden of persuading the reviewing court that the rule is valid. Thus the committee's objection has the effect of shifting the burden from the challenger to the agency, on the issue of the validity of the rule. A number of states have adopted similar systems.⁶³

The constitutionality of this system could be drawn into question by an argument, based on Chadha, that this system allows a legislative committee to intervene indirectly in the executive function of rulemaking. The contrary argument would point out that the system performs the traditional legislative task of allocating the burden of proof or persuasion in litigation. The Iowa Supreme Court upheld the validity of a similar system under that state's constitution.⁶⁴

C. Non-Deferential Judicial Review

Another possibility is to amend the judicial review provisions of the Administrative Procedure Act, so as to require the courts to exercise their independent judgment and not give any deference to an agency when reviewing its rules.⁶⁵ This adjustment to the standard of judicial review, if combined with

63. Iowa Code Ann. § 17A.4, .8; N.D. Cent. Code § 29-32-03.03; Vt. Stat. Ann. tit. 3, § 842.

64. *Schmitt v. Iowa Dept. of Social Services*, 263 N.W.2d 739 (Iowa 1978).

65. Senator Bumpers has introduced a number of bills to this effect, the most recent of which is S. 1776, 98th Cong., 1st Sess. (1983).

a provision conferring standing to sue upon either house of Congress or upon any appropriate congressional committee, would strengthen the ability of Congress to obtain judicial invalidation of ultra vires rules.

Serious policy questions arise from any proposal to establish independent judgment rather than deference to the agency as the general standard of judicial review. Years before Chadha, the Administrative Conference of the United States opposed the adoption of independent judgment as the general standard of judicial review.⁶⁶ Chadha does not give the Administrative Conference any significant reason to reconsider its position on this matter.

V. CONSTITUTIONAL AMENDMENT

The United States Constitution could be amended to overrule the Chadha holding and expressly allow one or more types of legislative veto.⁶⁷ Connecticut adopted this type of constitutional amendment in November 1982.⁶⁸ Attempts to adopt similar amendments in other states have been rejected by the electors.⁶⁹

66. Administrative Conference of the United States, Recommendation No. 79-6, 1 C.F.R. § 305.79-6.

67. Resolutions to amend the constitution have been introduced by Senator DeConcini, S.J. Res. 135, 98th Cong., 1st Sess. (1983) and by Congressman Jacobs, H.J. Res. 313, 98th Cong., 1st Sess. (1983).

68. Conn. Const. Art. II (as amended Nov. 1982).

69. The electors of Missouri rejected a proposed constitutional amendment on the legislative veto in November, 1982. Constitutional amendments were rejected in the preceding few years in Alaska, Florida and Texas. Legislative and Executive Veto, *supra* note 14, at 90.

The constitutional amendment process is slow and its outcome is uncertain. Whatever may be the merits of a constitutional amendment, and whatever other aspects of separation of powers or judicial review could be addressed in the same package of amendments, the constitutional amendment process obviously should not be relied upon for a near-term solution to the problems posed by Chadha and its companion cases.

VI. CONCLUSION

The models mentioned in this report may be considered either separately, or in combined packages. While each model could make some contribution to the improvement of congressional oversight of agency rulemaking after Chadha, the reporter suggests that two packages warrant the most serious attention as options for congressional follow-up to Chadha.

A. Package Consisting of Advisory Committee and Report and Wait With Automatic Effectiveness

One option is the establishment of a congressional committee on legislative oversight with advisory powers only (II.G, *supra*) together with a report-and-wait system in which the agency's rules would automatically become effective after a designated waiting period (II.I, *supra*). The committee, in keeping with its advisory nature, would not have the power to expedite or delay the effectiveness of rules. Agencies would have tightly limited powers to issue emergency rules with immediate effectiveness, subject to prior approval by a superior executive officer.

This package would satisfy the requirements of Chadha, since Congress could take no action except by statute. The system would give Congress a centralized committee to perform the rule oversight function, and would provide

a standardized period of time in which this function could be performed. This package is in effect, with some modifications, in a number of states.⁷⁰

B. Package Consisting of Advisory Committee and Superagency

The other option is the establishment of a congressional committee on legislative oversight with advisory powers only (ILG, *supra*), together with the creation of a superagency, with power both to promulgate or approve new rules (IIIA, *supra*) and to suspend or veto existing rules that agencies had adopted before the new system became effective (IIIB, *supra*). Agencies would have tightly limited powers to issue emergency rules with immediate effectiveness, subject to expedited review by the superagency.

This package would also satisfy Chadha, since Congress could take no action except by statute. The system would put the superagency in a dominant position over the rules of all agencies, including the independent commissions as well as the executive departments. The congressional advisory committee on legislative oversight would be able to focus its attention on the superagency. This package is an adaptation of the California system, in which the Office of Administrative Law fulfills the role of superagency, subject to review by the governor.⁷¹

70. The combination of an advisory committee and a report-and-wait system is found in Florida, Georgia, Hawaii, Maine, Maryland, Missouri, New Jersey, Oregon, South Carolina, Washington, West Virginia and Wyoming, subject to some variations among these states. See statutory citations, *supra* note 34, and Legislative and Executive Veto, *supra* note 14, at 98.

71. *Supra* note 54. This report does not examine the Pennsylvania Independent Regulatory Review Commission, created by Pa. Act. No. 1982-181, or the North Carolina system that provides for the governor's participation with a

C. The Two Options Compared

The first-mentioned option (advisory committee, report and wait, automatic effectiveness) leaves rulemaking power diffused throughout the executive departments and independent commissions, and gives Congress a short waiting period in which it can enact a statute to prevent a rule from becoming effective. Even after expiration of this period, Congress retains the power to enact statutes that will terminate the effectiveness of a rule by means of the repeal or amendment of the enabling act.

The second-mentioned option (advisory committee, superagency) brings together the rulemaking powers of all executive departments and independent commissions in a single superagency in the executive branch. The executive conducts the first round of review of proposed rules, and only the rules that survive that round are submitted to the advisory committee of Congress which exercises oversight over the superagency. This package establishes centralized executive oversight as well as an advisory system in aid of congressional oversight.

The success of either option must depend, to a great extent, upon the resources made available for staffing, and upon the calibre of the individuals who are appointed to senior positions. Even more crucial, perhaps, is the restraint that must be exercised by the elected officials in Congress and the White House, in order to allow and require the staff to perform its functions in a professional manner, within the framework prescribed by the statute establishing the system.

Continuation Footnote 71

legislative committee in the rule review process, Legislative and Executive Veto, *supra* note 14, at 110. The mixed membership of the Pennsylvania commission (including some members appointed by the governor and others by the legislative leadership) and the hybrid nature of the functions under the North Carolina system make them apparently unsuitable for adaptation at the federal level. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976).

Senator DeCONCINI. Mr. Gressman.

STATEMENT OF PROF. EUGENE GRESSMAN

Professor GRESSMAN. Thank you, Senator DeConcini.

I am glad to be back here once again before this committee. I come this time not necessarily in the role of a defeated attorney before the Supreme Court. I have, of course, been engaged in the teaching of constitutional law for a number of years now. More particularly, I did have the honor of representing the House of Representatives in the *Chadha* litigation and, indeed, in virtually all litigation involving the constitutionality of the legislative veto.

I started out the *Chadha* case with Mr. Neil Kennedy, who argued and briefed the case on behalf of the Senate in the ninth circuit. By the time we got to the Supreme Court, I picked up my good friend Stanley Brand, who assisted me in briefing and litigating that case before the Court.

So I have been in a unique position of constructing the arguments, the constitutional arguments, that support the veto, and I think I am in a peculiarly appropriate position to see and to convey to you some of the devastating impact of the Court's decision.

I might say at the outset that the Supreme Court did not address any of the constitutional arguments that were presented to it on behalf of the House or the Senate. Indeed, it totally misconstrued the kind of case that was before it, the *Chadha* case itself. It involved a very unique and distinct kind of legislative action. It was not even a true veto. It had nothing to do with vetoing any administrative rule or regulation, or revising any kind of judicial action by the Immigration Service.

It was purely and simply a case of Congress attempting to exercise its historic power to determine which illegal aliens should be allowed to attain the status of permanent resident aliens, a power which has always been resident in the Congress. In this instance, Congress simply used the Immigration Service to make certain findings of fact and recommendations for use by Congress in making its own final determinations.

The real question as to the validity of the great mass of legislative veto provisions was present in the two cases that were in the wings of the Court and that were summarily decided, without briefs or oral argument, 2 weeks after the *Chadha* decision, the *Federal Trade Commission* case and the *FERC* case. Those cases did involve legislative reversal or disapproval of proposed administrative regulations.

In those two cases, the House and the Senate were never given the opportunity to brief and argue the validity of the legislative veto of administrative regulations. We took each case as it came, and we concentrated in the *Chadha* case solely on the unique statutory provisions that were there involved. There was no occasion to brief the validity of the veto of administrative rules in *Chadha*.

In any event, the *Chadha* case does represent an attempt by the Supreme Court to resolve all kinds of legislative veto situations, most of which were not before the Court. That, indeed, is a most unfortunate aspect of the Supreme Court's action.

Moreover, the decision, as written, is virtually incomprehensible and without justification or rationalization. I am quite sure, Senator, that you have read Professor Tribe's analysis of the *Chadha* decision in the Harvard Journal of Legislation. I think that article accurately points out a very grave defect in this Court's opinion, that is, a totally unrealistic view that whatever is legislative in purpose and effect must be subject to bicameral-presentment processes. There is not much analysis beyond that simplistic statement. Professor Strauss' article in the Duke Law Journal essentially makes the same point. Actually, as far as Supreme Court decisions go, *Chadha* amounts to little more than an ipse dixit and an advisory opinion.

In my written statement, I attempt to pinpoint exactly what has happened to the Constitution as a result of the *Chadha* decision, and therefore what needs to be done by way of the proposed amendment.

To make a long story short, it seems to me that there are two levels of legislative action that we have to consider here. The first level is that of plenary legislation. Plenary statutes are enacted in a bicameral fashion, and they are presented to the President for approval. Every veto provision that has been in litigation, incidentally, appears as part of a plenary piece of legislation.

Pursuant to a duly enacted plenary statute, Congress frequently delegates to executive or administrative agencies a host of what the Supreme Court calls quasi-legislative, quasi-judicial, or even quasi-executive powers to be executed. That is the second level of legislative action. At this second level, we find the whole of administrative delegation and lawmaking which is a response to the modern governmental problems that have evolved in the last 50 to 100 years.

Now, what has happened as a result of the *Chadha* decision? *Chadha* basically says that (1) when certain quasi-legislative or quasi-lawmaking powers have been delegated to an agency, and (2) when Congress retains a part of that which could be delegated, that is, when it retains an oversight function or a legislative review or veto over proposed quasi-lawmaking functions, then Congress at that quasi-level must also follow the bicameral presentment process.

This requirement is totally contrary to the basic structure of article I. Article I, section 7, the bicameral-presentment requirements, obviously relates only to the enactment of plenary legislation. But we are not dealing here, in the legislative veto situation, with the enactment of any kind of plenary legislation. We are dealing with the second level of legislation, with a legislative approval of changes in the quasi-legislative rules or regulations that have been recommended by a duly authorized agency. That is not the enactment of new plenary legislation.

So it seems to me that the amendment that you have suggested exactly fits the problem created by *Chadha*. It says that executive action under legislative-delegated authority, which gets you immediately into the area of quasi or secondary level of legislation, may be subject to the approval of one or both houses of Congress without presentment, if the legislation that authorizes executive action so provides.

I think the amendment removes from the quasi or secondary level of legislation the bicameral-presentment requirement, which the Supreme Court moved down to that level in the *Chadha* decision. The amendment simply says that Congress may do what it deems necessary and proper in the way of legislative oversight pursuant to a duly enacted plenary statute.

Senator DECONCINI. Excuse me, Professor Gressman. You have suggested some language quite similar to that of Professor Elliott.

Professor GRESSMAN. Yes.

Senator DECONCINI. So obviously you think we could improve on this by adding "administrative" or "lawmaking" or something along those lines.

Professor GRESSMAN. Yes; and as I sat here this morning listening to the dialog on this problem, it occurred to me you might consider another formulation for executive action. It might be a mistake to attempt to distinguish between the executive and/or the administrative branch, as such.

I would throw out this possibility. Suppose that you start off the proposal by saying: administrative rules or regulations proposed under legislative-delegated authority. I think the main purpose of this amendment is to preserve this legislative review procedure as to proposed rules or regulations that have the effect of law.

I might say that the Supreme Court in footnote 16 of the *Chadha* opinion gave express recognition to what you were saying a few minutes ago, that many rules and regulations are quasi-legislative in nature. The Supreme Court has frequently referred to the quasi-legislative nature of administrative rule or lawmaking. Basically the problem that *Chadha* has created is whether or not the veto can be used with respect to quasi-legislative rules that do have the effect of law if Congress so says.

So I would suggest that a possible alternative phraseology would be to make it clear that you are referring simply to administrative rules and regulations propounded pursuant to delegated authority.

Senator DECONCINI. Professor Gressman, Mr. Smith has offered some alternative language. Let me read it to you. I do not believe that this would change his position and he would favor it, but he did offer some language which says:

Notwithstanding Article I, Section 7, Clause 3, executive action under legislative delegated authority may be subject to the approval of one or both houses of Congress without presentment to the President if the legislation that authorizes the executive action so provides.

Is that what you are saying, in essence?

Professor GRESSMAN. Well, it seems to me that goes around in a circle. I do not think you want to amend article I, section 7 to a "notwithstanding." You really need no reference here to any other provision in the Constitution.

Senator DECONCINI. You would prefer his other proposal? "Either House of Congress may veto rules and regulations issued by the executive department pursuant to laws passed by Congress," with no reference to article I, et cetera?

Professor GRESSMAN. I would have to study that a little more carefully.

Mr. SMITH. Mr. Chairman, if I may make one comment. The concern that prompted our suggestion was that as the amendment is

now written, it would supersede every other provision in the Constitution, with the exception of the provision that no State may be denied two Senators without its own consent. And it seems to me that would raise the possibility of eliminating or overcoming the due process clause of the fifth amendment. It would raise severe civil liberties questions.

So by adding our language, it would be clear that the amendment was intended only to overturn the *Chadha* decision, which was based on article I, section 7, of the Constitution. It would not allow Congress, through the veto mechanism, to override all but the Bill of Rights. That was the only purpose behind our suggestion.

The problem I still have is with the phrase "legislatively delegated authority," which to me seems to be ambiguous.

Senator DECONCINI. Excuse me. Professor Gressman, would you be so kind as to take the time and provide us with some language later?

Professor GRESSMAN. Yes, I would be glad to. I just had not had time to study the language you just referred to.

Senator DECONCINI. Yes, and it is unfair to throw that on you without preparation. I would welcome an opportunity for you to give us your thoughts on that.

Professor GRESSMAN. Basically, as I suggested in the written statement, the impact of the *Chadha* decision is to withhold or drain some of the legislative authority of Congress under the necessary and proper clause, article I, section 8, clause 18. That is the only clause in the Constitution that affirmatively empowers Congress to enact legislation, to achieve the great ends and powers of government vested in any of the branches.

Senator DECONCINI. I would like to get to Judge Scalia, if I can. Thank you, Professor Gressman.

[The prepared statement of Professor Gressman and information subsequently submitted follow:]

PREPARED STATEMENT OF PROF. EUGENE GRESSMAN

I submit this statement to the Committee in support of S.J.Res. 135, which would amend the Constitution specifically to permit the use of the congressional veto device. Such an amendment is necessary to undo the constitutional damage wrought by the Supreme Court's decision last term in INS v. Chadha, 103 S.Ct. 2764 (1983).

I limit this statement to a survey of Chadha's destructive dislocation of the legislative powers of Congress, so carefully crafted by the framers of the Constitution. Only after that dislocation has been identified can the amendment proposed in S.J.Res. 135 be properly assessed. Does the proposal really address and cure what Justice White described as "the destructiveness of the Chadha holding"? Does the proposal restore and reinvigorate the full constitutional sweep of the legislative powers vested in Congress by Article I of the Constitution? And precisely what are the legislative powers that have been taken away by, in Justice White's words, "the constitutional myopia of the Chadha reasoning"?

In making this brief survey of Chadha's constitutional destructiveness, I speak not only as a professor of constitutional law but as a special counsel to the House of Representatives who briefed and argued the Chadha case from beginning to end. Indeed, I have been representing the interests of the House in all litigation involving the validity of the legislative veto device, since the problem first surfaced in 1976. Thus I speak as a first-hand witness to the legislative powers at stake in the Chadha litigation and to the substantial limitations placed on those powers by the Chadha decision. In sum, I can testify as to the dislocation of legislative and executive powers brought about by the Chadha ruling.

A. The pre-Chadha constitutional scheme

(1) The plenary level of legislation. The basic power of Congress to legislate or enact laws is found in the Necessary and Proper Clause, Article I, Section 8, clause 18. That clause vests affirmative power in Congress "To make all Laws which shall be necessary and proper for carrying into Execution

the foregoing [congressional] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." And Congress "makes" such necessary and proper laws by following the bicameral/presentment procedures set forth in Article I, Section 7. The laws enacted in this fashion are what I call plenary legislation. And that is the only kind of legislation to which the Constitution makes applicable the bicameral/presentment requirements of Article I, Section 7.

(2) The secondary or quasi level of legislation. Over the past century, a new kind of legislative action has developed, one that was not within the contemplation of the framers of Article I, Section 7. This is what we know today as delegated lawmaking authority within the structure, bounds and standards of a duly enacted plenary statute. Congress, in formulating a plenary statute, has frequently found it necessary and proper to delegate to an executive officer or an administrative agency certain lawmaking functions, by way of promulgating rules or regulations that, to borrow the language of the Chadha opinion, have "the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch." In short, this kind of delegated lawmaking, often described by the Supreme Court as "quasi-legislative" in character, is at the core of the administrative process, a part of what is popularly known as the fourth branch of government.

The critical point about this quasi level of legislation is that the delegated lawmaking function has never been subject to the bicameral/presentment processes of Article I, Section 7. Quasi laws become law only when and under such conditions as Congress specifies in a duly enacted plenary statute, the very statute that delegates the quasi lawmaking function in the first place. Moreover, before Chadha, the Supreme Court repeatedly recognized that, in distributing or delegating various quasi lawmaking functions under a plenary statute creating certain "public rights," Congress "may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals." Ex parte Bakelite Corp., 279 U.S. 438, 451 (1929)(emphasis added). The legislative veto device falls precisely within that description of a quasi lawmaking

matter as to which Congress has "reserve[d] to itself the power to decide." In other words, Congress may be said either to have retained or not delegated a part of the quasi lawmaking function, or to have delegated by statute a part of the function to one or both Houses. But to repeat, the bicameral/presentment requirements of Article I, Section 7 have never been deemed applicable to quasi or delegated lawmaking, no matter to whom the delegation is made.

Put differently, execution of any delegated lawmaking function "must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes." Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979). The manner in which this quasi function is delegated or dispersed reflects the discretionary innovativeness that is the essence of the "necessary and proper" legislative powers of Congress.

B. The post-Chadha constitutional chaos

The constitutional revisions attributable to Chadha may be quickly summarized:

(1) Chadha has significantly limited the legislative powers of Congress under the Necessary and Proper Clause by ruling that Congress cannot provide, within the ambit of a duly enacted plenary statute, appropriate procedures for reviewing, approving or disapproving proposed executive or administrative actions. Congress can do so only by enacting new plenary legislation.

(2) Chadha has extended the applicability of the bicameral/presentment procedures of Article I, Section 7 beyond the area of plenary legislation to the secondary or quasi level of legislation, at least insofar as congressional action at the secondary level is concerned.

(3) Chadha seemingly requires that Congress follow the bicameral/presentment procedures even when one or both Houses fail to approve, or veto, proposed executive or administrative quasi legislation. In other words, Congress can say "no" to a proposed change in quasi legislation only by enacting a new plenary statute that says "no." That makes as much sense as holding that the Senate or House can constitutionally vote down a change in plenary law proposed by a Member of either House only by enacting a plenary statute codifying the negative vote.

(4) Chadha leaves the area of executive and administrative quasi lawmaking in a state of constitutional confusion. Chadha seems to say, particularly in footnote 16 of the opinion, that the executive or agency is acting as an Article II administrator of the statute when performing quasi legislative functions delegated by that statute, but that when Congress retains or delegates unto itself a portion of that same kind of function it necessarily acts in a legislative capacity. But what are the constitutional consequences of such action taken by the executive or the agency, assuming that Congress cannot constitutionally condition that action on legislative review and approval? Are all executive and administrative quasi laws made only as proposals for legislative consideration and approval (now rendered impermissible by Chadha) to be considered as cast in constitutional concrete, effective as a matter of law (despite congressional intent to the contrary) when and as promulgated by the delegatee?

(5) Chadha has already spawned, by its apparently limitless scope, difficult problems not only for Congress but for the lower courts, which must now wrestle with problems of retroactively applying or not applying Chadha to countless quasi laws that were at least subject to legislative review in the past. Justice White's expressed fear that Chadha "sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto'" reveals only the tip of the iceberg of legal and constitutional chaos that threatens to inundate the legal system. Certainly the time has come for some sort of statutory or constitutional clarification and amelioration, perhaps along the line suggested by S.J.Res. 135.

(6) Chadha basically calls for a reduction in the legislative power of Congress, with a corresponding aggrandizement of executive power. That suggests that we are witnessing a major realignment of powers as between the legislative and executive branches. The most unfortunate aspect of the realignment is that it is dictated by a Supreme Court opinion that is so inadequate in constitutional rationalization or justification. Ultimately, Chadha may represent "a transition to a more thoroughgoing repudiation of the constitutional upheaval that led to the approval, beginning in the mid-1930's, of the modern administrative state." Tribe, The Legislative Veto Decision: A Law By Any Other Name?, 21 Harv.J.Legis. 1, 17 (1984).

(7) Time does not permit me to make an extended analysis of the S.J.Res. 135 proposal. My initial reaction is that the proposed amendment would cure most of the constitutional problems created by Chadha and would restore the intended balance of powers between the legislative and executive branches. But I would suggest that the opening words of the proposal -- "Executive action under legislatively delegated authority" -- be altered by adding two words "or administrative" -- so that the phrase would read: "Executive or administrative action under legislatively delegated authority".



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SCHOOL OF LAW

March 22, 1984

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919-962-4120

Senator Dennis DeConcini
Committee on the Judiciary
Subcommittee on the Constitution
United States Senate
Washington, D. C. 20510

Re: S.J.Res. 135, proposing an amendment to the
Constitution of the United States for the
establishment of a legislative veto.

Dear Senator DeConcini:

At the close of the Subcommittee's hearing on March 2, 1984, you requested that I prepare and submit my suggestions for clarifying the language of the amendment proposed by S.J.Res. 135, particularly in light of the comments by various witnesses at that hearing. I accordingly submit the following:

Article ---

SECTION 1. The Congress shall have power, in enacting appropriate legislation, to authorize any Department or Officer of the United States to take prescribed action subject to approval by both Houses of Congress, or disapproval by either or both Houses, without presentment to the President.

In explanation of the changes incorporated in the above language, I make the following comments:

1. I believe that the purpose of the amendment is to vest affirmative power in Congress to include legislative veto provisions in any plenary statute that Congress is otherwise authorized to enact. Hence I have structured the sentence to subordinate the reviewable executive-type action to the power of Congress to enact such review provisions. Structuring the amendment to emphasize the power of Congress is consistent with the structuring of other constitutional provisions dealing with the legislating powers of Congress, such as the Necessary and Proper Clause of Article I, Section 8, and the Fourteenth Amendment's Section 5.

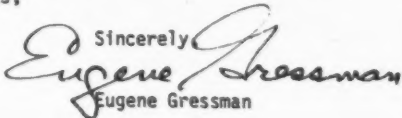
2. S.J.Res. 135 refers to "Executive action under legislatively delegated authority." This phrase has engendered numerous comments and questions, such as whether "Executive action" should be altered to read "Executive and administrative law-making" and whether the "legislatively delegated authority" reference should be deleted. I feel that the language of both S.J.Res. 135 and such suggested rephrasing contains words foreign to the present Constitution; indeed, by limiting legislative veto provisions to some kind of delegated law-making, we would create serious problems as to what constitutes "law-making" and, if defined to mean administrative rules that have the force and effect of law, this language might foreclose enacting veto provisions vis-a-vis non-law-making actions of the Executive. Hence I suggest language that gives Congress the maximum constitutional flexibility in dealing with legislative review problems. My suggested language has two elements:

a. Instead of using the words "executive" or "administrative," I suggest borrowing from the Necessary and Proper Clause the words "Department or Officer of the United States." These words encompass all kinds of executive officers from the President down, all executive agencies, all independent agencies, and all administrative officials.

b. Instead of referring to some kind of action pursuant to "legislatively delegated authority," I have used the thought that Congress shall have power, in enacting legislation, to "authorize any Department or Officer of the United States to take prescribed action" subject to the veto. That phrase certainly gives Congress maximum flexibility in applying the veto to any kind of delegated or discretionary action within the ambit of a given statute, whether or not the action is "law-making" in nature. As John Marshall would say, this is a constitution we are creating and expounding, and we should not limit the power of Congress to apply veto provisions to situations that we cannot now foresee.

3. I note that S.J.Res. 135 speaks of the veto in terms of "the approval [of Executive action] of one or both Houses of Congress." I do not understand how but one House would want to approve the action under review, and I know of no veto provision that has been structured in that fashion. There are, of course, numerous instances of approval or disapproval by concurrent resolution of both Houses, but one House normally acts only to disapprove -- not to approve. I have accordingly suggested that the veto language be clarified to read: "subject to approval by both Houses of Congress, or disapproval by either or both Houses." Again, we should give Congress maximum flexibility in setting up veto procedures.

I shall be happy to discuss these suggestions further at your convenience. With my personal respects,

Sincerely,

 Eugene Gressman

STATEMENT OF HON. ANTONIN SCALIA

Judge SCALIA. Thank you, Senator.

To understand why I am here, you need only to recall the last scene in "Casa Blanca" when Humphrey Bogart is flying off in the plane and Peter Lorie is going to cover up the crimes he has left behind, and Lorie turns to his assistant—was it Sidney Greenstreet? I do not know. He was in the movie somewhere—and he says, "Round up the usual suspects." I am one of the usual suspects.

I got involved in this legislative veto stuff when I was assistant attorney general at the office of legal counsel. It was in the days when the legislative vetos first became very frequent. I continued my interest in the subject when I left the executive branch and became a law professor at the University of Chicago.

In those two capacities, I have probably testified before more committees concerning legislative veto than certainly the vast majority of living or dead people. So here I am again.

On this occasion, of course, I have no ax to grind.

Senator DeCONCINI. Well, that does well for you.

Judge SCALIA. No views to depress upon you since I have been—

Senator DeCONCINI. Are you counting your confirmation hearing as one of those?

Judge SCALIA. No, no. I was not even counting that, Senator. I said nothing about the legislative veto on that occasion.

I have been invited by the committee to share whatever thoughts I have for what help they can be, and I am happy to do that. I regret that I did not have time to get remarks to you in advance. My backlog is longer than my brother Mikva's, and I just could not get to it.

The Court's decision in *Chadha*, it seems to me, was entirely correct in its result and in its reason. When Congress takes action that alters the powers of the Executive, it is making law. That situation is not changed if it says in advance that it is going to alter the powers of the executive, which is essentially what the legislative veto provision added to a statute is.

I do not want to go back over that ground. It seems to me the Court has disposed of it clearly and authoritatively in *Chadha*, and that is one of the good things about the *Chadha* opinion, it seems to me. There are no five-part tests or balancing of interests, the kinds of things that leave many things to be decided in the future and that make for uncertainty in the law. None of that is in *Chadha*. It is a clearcut decision, and a clearcut decision not even by a close Court.

Now, my good friend, Peter Strauss, can afford the luxury of indulging in speculation as to where the veto might be good and where it might be bad. I used to indulge in that luxury myself when I was a law professor, but that is not the kind of uncertainty that can be afforded in the processes of Government. It is absolutely necessary and entirely good that the *Chadha* decision was clearcut, it seems to me.

That is for several reasons. Like any provision of the Constitution which deals with the process of lawmaking, the rules have to

be clear. People cannot be left in uncertainty until there is a court challenge as to whether this law is, indeed, valid or invalid, as to whether a congressional veto is effective or ineffective. It is essential that the rules be clear.

Chadha achieves that, and it seems to me it was the only way to achieve that.

Another reason——

Senator DECONCINI. Excuse me, Judge. Do you think the *Chadha* case applies to the rules of evidence on the judicial branch? I think it was Mr. Kennedy who raised that question this morning.

Judge SCALIA. Yes.

Senator DECONCINI. Is that out, too?

Judge SCALIA. I assume that that is out, too.

Senator DECONCINI. As a judge, may I ask you, if you care to respond, why didn't the Court say so? As I understand, *Chadha* did not make any reference to the judicial veto process, only the legislative veto process, of the executive's action.

Judge SCALIA. Well, I think I can understand that. To begin with, the Court should not reach any further than it has to.

Senator DECONCINI. Well, it reached a long way in *Chadha*.

Judge SCALIA. Well, it had another case right behind *Chadha* that was going to bring up the rulemaking issue. In that situation it was clear enough, but especially to reach further in order to free itself from an apparent obstacle, it seems to me, would have been a little bit unseemly.

Senator DECONCINI. Thank you.

Judge SCALIA. If you were sitting there and said, "Should we say one more thing? By the way, the legislative veto attached to our action is also bad," I think it was polite, at least polite, Senator, not to do so.

Senator DECONCINI. Had there been a case behind it, should they have gone ahead and done it then regarding the judicial?

Judge SCALIA. No, I think they probably would have taken that separately. It raises a theoretically separate issue in some ways, but as far as the logical rationale of the Court's decision goes, I do not know why it would apply to one rather than the other.

Senator DECONCINI. Thank you. Go ahead.

Judge SCALIA. In any case, another reason why this certainty is necessary and good, it seems to me, is that it took the executive branch about half a century to muster the courage to bring the *Chadha* case. Constant challenges between the executive and the Congress are not desirable, and the executive avoids them as much as possible, of course. The legislative veto has been difficult for the executive for many years, but I think it is quite remarkable that it took half a century for the executive to finally say, well, we are going to go to the mat.

Had *Chadha* been a vaguer decision, there would have been all sorts of uncertainties that would have gone on for other half centuries. Thank goodness that is not the situation we are in. Thank goodness also Congress has recognized that and has behaved most responsibly, it seems to me, in all of its reactions that I have seen toward the decision.

All of the proposals that are under discussion today are forthright attempts to either take account of the *Chadha* decision, as it

is written, or to reverse the *Chadha* decision, acknowledging the reality of what *Chadha* says and taking steps to remedy that reality, as Congress believes or as the drafters of these proposals believe it needs remedying.

That is much preferable, it seems to me, to not taking a fairly clearcut and by no means close Supreme Court decision at its word. It would be regrettable, in my view, for Congress to accept my brother Mikva's suggestion that it play around with the severability clause and engage in a sort of constitutional "chicken" with the Supreme Court. That does not seem to me anything is to be gained by that, and a lot of private litigants are going to be very much hurt by not knowing what the law is for a number of years.

Let me discuss very briefly the principal proposals that you now have before you, and let me first address the constitutional amendment approach, Senator, which you have proposed, and others.

Because *Chadha* was, as I have suggested above, a principal constitutional decision, one must recognize that in proposing a constitutional amendment one is changing a principle of the Constitution. It seems to me an important principle of the Constitution, which is why the Supreme Court was willing to take the heat that it did on the *Chadha* case. It is a very important principle, and I urge you to give deep consideration to whether the game is worth the candle.

It seems to me that such a provision fundamentally alters the checks and balances between the executive and legislative branches. In the debate in the Constitutional Convention on article I, section 7, clause 3, on the requirement of Presidential approval of legislation, it was stated that unless this provision existed, the President would be deprived of his powers one by one. That is more or less the way the statement read.

I think that this constitutional amendment would surely permit that to happen. It gives Congress the power to attach to all delegation to the executive the requirement that before he perform that delegation, he come back and check with the Congress. That, it seems to me, is a great debilitation of the executive.

It can be said, of course, Congress will only use it responsibly. Well, that may be, but I do not know why in the nature of things it should be. When Congress has a great power such as this, one would expect Congress to use it. Now, most often it will be used responsibly, but one cannot be sure of that, and that is why one has checks and balances.

Certainly sometimes checks and balances go too far and prevent some things that might be desirable, but that is a prophylactic necessity in order to prevent great abuse. Some desirable procedures may perhaps be prevented. It seems to me that that is what this current situation does, and it seems to me that there is a great risk in changing that fundamental element of the sensitive balancing between the branches of Government.

Senator DeCONCINI. Judge, do you think the 22d amendment limiting the terms of the President is the same argument? It was a fundamental change as to the independence of the constitutional prerogative of the Executive.

Judge SCALIA. No, I do not see how that affected the Executive's power while he was in office at all.

Senator DECONCINI. Well, he could not stay in office long.

Judge SCALIA. He could not stay in office, but I do not think that has any effect on what powers he has while he is there, and as I recollect, it merely enacted into the Constitution a practice that had been thought to be almost an unwritten constitutional rule from the time of George Washington until Franklin Roosevelt. I do not think it was regarded as anything except an enshrinement of a long American tradition.

Every constitutional amendment changes the Constitution. That is not my point. I am not criticizing your proposal for amending the Constitution because it amends the Constitution.

Senator DECONCINI. No, I understand.

Judge SCALIA. But I think that this is——

Senator DECONCINI. It just seems to me that whenever you have a constitutional amendment you are obviously making a dramatic, fundamental change

Judge SCALIA. Well, some are more dramatic.

Senator DECONCINI. Perhaps your argument is that if you are going to do this, do not do it by constitutional amendment but rather some other way. Would you care to speculate on what is the best way, assuming we are going to do it, even though I understand your position is that we should not?

Judge SCALIA. All right. Let me say one more thing about the constitutional route. There has been suggestion that perhaps the risks could be minimized and the damage limited by drawing the constitutional amendment more narrowly so that it applies to only rules or rulemaking. I think there are several problems with that.

First of all, I think it is theoretically unsound. Executive action is Executive action. The Executive is behaving fully as much as an Executive when he is issuing a rule.

Senator DECONCINI. Even in the quasi-legislative, as has been said here——

Judge SCALIA. Right.

Senator DECONCINI. In the quasi-legislative, when they are making rules that have the force and effect of law?

Judge SCALIA. Right. That is awful stuff. Justice Jackson has a beautiful line in one of his opinions in which he says the particle "quasi" is appended to the beginning of the word "legislative," when we say quasi-legislative in order to hide our confusion, much as a housewife will draw a counterpane over a disordered bed.

Senator DECONCINI. Well, do you think it is not legislation when a rule is made?

Judge SCALIA. It is surely not legislation. If it were legislation, it would be unconstitutional. The whole theory of Congress when it delegates this, and that is why you have the doctrine of unconstitutional delegation, Congress makes its judgment and says, "No, we are not giving away legislative authority. We have made all of the necessary judgments that have to be made. We give it to the agency."

Senator DECONCINI. And we tell the agency, "now you go ahead and administer it."

Judge SCALIA. That is right.

Senator DECONCINI. And in administering it, they issue rules that particularly define violations and penalties in, for instance the

environmental area, or many other areas in the field of health, and if you violate those rules that are issued by the executive branch pursuant to the delegated authority from the legislative branch, you have to come before the bar or some place and defend yourself.

Judge SCALIA. Certainly. It is executive action, Senator, or else it is unconstitutional. The Executive has been doing that from the beginning of the Republic, in the 1700's.

Senator DECONCINI. I do not argue with that. They have been doing it, and it certainly is legislation in my opinion.

Judge SCALIA. Well, if it is, it is unconstitutional.

They can achieve the same results, by the way, and this is another flaw with the whole thing, without issuing something called a rule. The Federal Trade Commission, for example, never had rulemaking authority or asserted that it had it until the 1960's, and could do exactly the same thing without issuing a rule. That is another problem with drawing the constitutional amendment in that way.

Indeed, it is a problem with even some of the statutory proposals because to the extent you put more and more encumbrances upon agency action through rulemaking, you will be driving the agencies back to adjudication, which most scholars in administrative law do not think is a good thing, and I understand that some people think that that move back toward adjudication is already in full swing not only because of legislative vetoes, but also because of Executive Order 12291 and all of the other tensile that has been hung upon rulemaking nowadays, some of it by my branch of Government, as well as by yours.

Finally, let me just make one comment regarding the statutory approaches that have been suggested. I do not know anything in those that seem to be contrary to the Supreme Court's opinion in *Chadha*, but I am somewhat puzzled by one of the provisions in Senator Grassley's bill which says that the enactment of an appropriate resolution approving a major rule shall not be construed to create any presumption of validity with respect to such rule and shall not affect the judicial review of such rule.

A provision like that, it seems to me, makes a lot of sense when you are talking about the failure to disapprove a rule, but where you have set up a structure in which, in order for a rule to be effective, which Senator Grassley does for major rules, Congress specifically endorses the rule and passes a piece of legislation saying, this rule is valid, and the President signs it. It seems to me very strange to then say, however, this rule may still be taken over to the courthouse and challenged as being contrary to law, even though our lawmakers have just said it is OK. I find that a very strange provision, and I do not know what a court should be supposed to do with it.

It seems to me that you should have the courage of your convictions, and if you approve a major rule, you approved a major rule, period. Whether or not it is constitutionally valid, it seems to me, is not too sensible a provision. I wish Senator Grassley—

Senator DECONCINI. You would not want to prohibit a constitutional challenge to a rule, even if it were an approval of a rule issued by the executive branch? That is not what you are saying, is it?

Judge SCALIA. I am not talking about constitutional challenges. As I understand the purpose of this provision—now maybe I am misunderstanding it—I think that the purpose of it is to permit a challenge of that rule on the ground that it does not comply with the statute.

Senator DECONCINI. Yes; that is what I think it is, too, rather than a challenge to the fundamental constitutionality.

Judge SCALIA. Right; that would always be challengable. The second statute could not remedy that any more than the first one could.

Senator DECONCINI. Of course. Go ahead.

Judge SCALIA. But it seems to me the second statute remedies whatever defect there is in the first one.

Senator DECONCINI. I just wanted to make that clear.

Judge SCALIA. That is all I have to say, Senator, and I appreciate your hearing me out.

Senator DECONCINI. Thank you.

Mr. Benson, do you have questions on behalf of Senator Hatch?

Mr. BENSON. Yes; just one or two. Thank you.

Senator DECONCINI. Go right ahead.

Mr. BENSON. Mr. Smith, I heard you say in your statement that the legislative veto, in your opinion, is functionally ineffective; is that correct?

Mr. SMITH. Yes, one of the criticisms in the Conference's 1977 recommendation is that it is functionally ineffective.

Mr. BENSON. Now, do you know of any empirical studies to back up that statement or, contrarily, to support any effectiveness some people think the legislative veto has, such as a deterrent effect on the agencies or an effect on the way legislation is enacted?

Mr. SMITH. No, I do not. In fact, we discussed this precise question at the last plenary session of the Administrative Conference, which a number of members of the last panel participated in. Neal Kennedy is a member of the Conference, as are Peter Strauss and Judge Scalia.

We held a debate on the legislative veto, and participants included some of the people who have been most involved in the issue both from the executive branch and from the public. A number of points were made in the debate—I should add that the debate transcript will be edited and available for the committee, hopefully, by next week—but one point was that out of the 200-some legislative veto statutes, there were only a handful of instances where the legislative veto had been exercised. So, just numerically, the use of legislative veto has been very, very limited.

With respect to the deterrence question, the big problem is that most of the discussions are informal discussions between congressional staff and the agencies. So it is difficult to determine the deterrent effect of the legislative veto.

We have not had a nuclear war. So we assume our nuclear deterrent works. It has worked 100 percent of the time. It is that type of argument.

Judge SCALIA. There is one study which is now somewhat old. It must be 6 or 7 years ago. There was a study done by Professors Gelhorn and Broff. I think it appears in the Harvard Law Review, and it studied a number of agencies that had been subject to legis-

lative veto. Its conclusion was, and I think one can observe this on the face of it, the Office of Education of HEW has been subject to the legislative veto for over a decade now. If there is any thought that that agency is somehow less off on its own than the rest of the Government, then that would be some demonstration of the effectiveness of the veto.

In any event, the conclusion of Gelhorn and Broff was that the effect of the legislative veto was quite clearly to increase the power of congressional staff and of individual committee chairmen, but there was no indication whatever that it increased the power of the Congress at large.

Mr. BENSON. May I ask one more?

Senator DECONCINI. Yes.

Mr. BENSON. Thank you.

Professor Gressman, I would like to ask you this question, since you have had so much experience with the *Chadha* decision. If we had a legislative veto go into a bill in Congress that said that the only thing Congress could do after an agency promulgates a rule is look at the rule and make a finding whether that rule is in accordance with the authority initially granted to the executive branch. If it is found not to be in accordance with that authority, then Congress could veto or stop the rule from going into effect.

Maybe I could ask all three of you to respond to that question. If such a veto was now placed in bills, do you think it would pass constitutional muster in light of *Chadha*?

Professor GRESSMAN. You say if there is any rationalization in *Chadha*. No, I do not think it would pass muster. You cannot pinpoint the precise reason why a Senator or a Congressman would want to disapprove a particular proposed regulation. Some of them may think that it exceeds the powers delegated to the agency. Others may have, frankly, political reasons.

I do not think you could force the Congress really to concentrate on that question or expect Congress to enact a resolution that was solely based on whether or not it was in accord with the delegated authority.

But even if it could, I do not think that *Chadha* in its simplistic approach to life says that any legislative action that has the effect and purpose would have to be presented to the bicameral-presentment process. I do not think you could exclude that proposition.

Mr. BENSON. Judge Scalia.

Judge SCALIA. I think it would be not just as bad. It would be worse. It seems to me it would add to the clear entrenchment upon the powers of the Executive, impingement upon the powers of the court, Congress seeking to set itself up as determining whether the action is in compliance with the statute.

It would also have the effect of being, I hope, disingenuous. We really do not elect Senators and Congressmen to do research in legislative history. They are not supposed to be pouring over musty volumes in the library to see what the 79th Congress really meant when it passed this particular statute or what, indeed, the Federal Trade Commission Act means. I hope that that is not what they are about.

When they speak of legislative intent, they mean their intent today. They are supposed to do something for the country that it

needs now, not decide for us what their predecessors thought we needed 30 years ago.

So I think it is not only bad; it is a bad idea.

Mr. SMITH. Let me make one slightly different comment. I agree that, constitutionally, that would not pass muster under *Chadha*. But I testified—not on behalf of the Conference, but personally—in favor of the Grassley approach, which I guess is the Lott bill in the House. It seems to me that approach is useful because there is a systemic dysfunction in our Government—a systemic dysfunction developed over the last 15 or 20 years. There is a real feeling that Government is too intrusive, and the Grassley bill is an approach to that problem.

We were specifically asked this question by Senator Grassley, as to whether in some way—under the system of congressional affirmative approval through a joint resolution signed by the President—one could at least protect the options for judicial review. I thought that the proposed compromise was not a particularly bad one; that is, where the Congress would, under that system, approve a major rule, but only in general terms.

Mr. BENSON. Thank you.

Senator DECONCINI. Gentlemen, thank you very much. Your testimony has been extremely helpful. We appreciate the contribution of your time and expertise that you have given us this morning and the very good record we have made.

Thank you.

Mr. SMITH. Thank you very much, Senator.

Senator DECONCINI. We will stand in recess subject to the call of the Chair.

[Whereupon, at 12:08 p.m., the subcommittee was adjourned, subject to the call of the Chair.]

